Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1997

OUIDA SUE PARKER,

Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, SCHERING-PLOUGH CORPORATION and SCHERING-PLOUGH HEALTH CARE PRODUCTS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

KAYE G. BURSON
Counsel of Record
ROGER K. RUTLEDGE
RUTLEDGE & RUTLEDGE, P.C.
1053 West Rex Road, Suite 101
Memphis, Tennessee 38119
901/682-0667

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the definition of the term "employee" in Title I of the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*, includes a totally disabled employee who is eligible for post-employment fringe benefits and, if so, whether such disabled employee by reason for such eligibility is a qualified individual with a disability who has standing to bring a cause of action under Title I challenging a long-term disability insurance plan which provides lesser benefits to persons with mental disabilities than are provided for persons with physical disabilities.

2. Whether Title III of the Americans With Disabilities Act, 42 U.S.C. § 12181 *et seq.*, prohibits discrimination against individuals with disabilities in the contents of goods and services, including insurance products, offered by private entities operating public accommodations, and is not limited to prohibiting merely discrimination in physical access to structures constituting places of public accommodation.

3. Whether Title IV of the Americans With Disabilities Act, 42 U.S.C. § 12201 *et seq.*, provides a safe harbor for private entities offering insurance products and services only to the extent that discriminatory classifications based upon disability in such products and services can be shown to be consistent with sound actuarial principles, actual reasonably anticipated experience, and bona fide risk classifications, and not an unconditional safe harbor to discriminate against individuals with disabilities in the contents of insurance products and services.

PARTIES TO THE PROCEEDING

The Petitioner, Ouida Sue Parker ("Parker") is a resident of Memphis, Shelby County, Tennessee. Petitioner was the Plaintiff before the United States District Court for the Western District of Tennessee and the Appellant before the United States Court of Appeals for the Sixth Circuit.

Respondent Metropolitan Life Insurance Company ("MetLife") is an insurance company doing business in the State of Tennessee. Respondents Schering-Plough Corporation and Schering-Plough Health Care Products, Inc. (hereinafter collectively "Schering-Plough") are corporations doing business in the State of Tennessee. Respondents were the Defendants before the United States District Court for the Western District of Tennessee and the Appellees before the United States Court of Appeals for the Sixth Circuit.

There are no other parties to this action.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered August 1, 1997.

OPINIONS BELOW

The opinion of the court of appeals *en banc* (App., *infra*, 1-40) is reported as *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997). The opinion of the panel of the court of appeals (App., *infra*, 41-70) is reported as *Parker v. Metropolitan Life Ins. Co.*, 99 F.3d 181 (6th Cir. 1996) (vacated on rehearing). The opinion of the district court (App., *infra*, 71-99) is reported as *Parker v. Metropolitan Life Ins. Co.*, 875 F.Supp. 1321 (W.D. Tenn. 1995).

BASIS FOR JURISDICTION

The judgment of the court of appeals *en banc* was entered on August 1, 1997. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 1 of the Americans With Disabilities Act, 42 U.S.C. § 12111(4) and (8) provides:

(4) Employee

> The term "employee" means an individual employed by an employer. . . .

(8) Qualified individual with a disability

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. . . .

Title 1 of the American With Disabilities Act, 42 U.S.C. § 12112(a) and (b) provides in relevant part:

Discrimination

(a) General rule

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

> As used in subsection (a) of this section, the term "discriminate" includes –
>
> > (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria or methods of administration –

(A) that have the effect of discrimination on the basis of disability. . . .

Title III of the Americans With Disabilities Act, 42 U.S.C. § 12181(7)(F) provides:

(7) Public accommodation

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce –

. . .

(F) . . . insurance office . . .

Title III of the American with Disabilities Act, 42 U.S.C. § 12182(a) ad (b) provides in relevant part:

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any

person who owns, leases (or leases to) or operates a place of public accommodation.

(b) Construction

(1) General prohibition

(A) Activities

(i) Denial of Participation

It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages or accommodations of an entity.

(ii) Participation is unequal benefit

It shall be discriminatory to afford an individual . . . on the basis of a disability . . . directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good . . . that is not equal to that afforded to other individuals.

(iii) Separate benefit

It shall be discriminatory to provide an individual . . . on the basis of a disability . . . directly, or through contractual, licensing, or other arrangements with a good . . . that is different or separate from that provided to other individuals, unless such action is necessary to

> provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation or other opportunity that is as effective as that provided to others.

Title IV of the Americans With Disabilities Act, 42 U.S.C. § 12201(c) provides in relevant part:

> (c) Insurance
>
> Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict –
>
> (1) any insurer . . . or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (2) a person or organization covered by the chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on understanding risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.
>
> Paragraphs (1), (2) and (3) shall not be used as a subterfuge to evade the purposes of subchapters I and III of this chapter.

STATEMENT OF THE CASE

Petitioner, an employee of Respondent Schering-Plough, worked at its Memphis, Tennessee, facility from April 20, 1981, until she went on disability status on October 29, 1990, due to chronic severe major depression of a physical origin. During her employment she participated in a long-term disability insurance plan provided and/or administered by Respondents Schering-Plough and MetLife. The plan provided for disability benefit payments up to age sixty-five for participants who had physical disabilities; however, for mental or nervous disabilities, the plan provided for benefits up to twenty-four months. Petitioner received benefit payments under the plan for twenty-four months, at which time the benefits were terminated pursuant to the terms of the plan on the ground that she had a mental disability.

Petitioner timely filed causes of action for, *inter alia*, violation of the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA" or "the Act"), against Schering-Plough as her employer and as plan administrator and against MetLife as provider of the long-term disability insurance and administrator, alleging that the termination of her benefits after two years because she was mentally disabled and the denial of benefits to age sixty-five, which she would have received had she been physically disabled, constituted an unlawful discrimination based upon disability in violation of the ADA. The cases were consolidated.

Upon motions by Respondents, the district court dismissed Petitioner's claims under Title I of the ADA, holding that because she was totally disabled, she was

not a "qualified individual with a disability" and, therefore, did not have standing to sue under Title I. App., *infra*, 80-81. Further, the district court granted Respondent MetLife's motion to dismiss under Title III of the ADA, holding that Title III only addresses physical access by a disabled person to goods and services of a place of public accommodation. App., *infra*, 83. The district court also granted a motion by Respondent Schering-Plough to dismiss under Title III, holding that Title III did not govern employment practices and did not apply to Schering-Plough. App., *infra*, 84.

Petitioner, appealed to the Sixth Circuit, and a three judge panel affirmed the district court decision as to the Title I claims and reversed as to Title III, concluding that Title III prohibits discrimination based on disability in the contents of goods and services, including insurance products, offered by private entities which operate places of public accommodation. App., *infra*, 54-55. Respondents requested a rehearing *en banc* on the Title III holding. On February 6, 1997, the panel decision was vacated. The court of appeals on rehearing *en banc* reversed the panel decision by a vote of eight to six, holding that title III did not apply because Petitioner did not physically access her long-term disability insurance from a place of public accommodation when she obtained it through her employer and, further, that Title III applies only to the availability of goods and services offered in places of public accommodation and not to the contents of such goods and services, including insurance products. App., *infra*, 11-12.

Two dissenting opinions filed with the *en banc* decision criticized the narrow holding of the majority for

creating an unnecessary conflict with the decision of the First Circuit in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994), and concluded that, by limiting the application of Title III to "physical access to an office" and by rejecting the view of the Department of Justice and the Equal Employment Opportunity Commission that employer group insurance is covered by the statute, the majority created a conflict which will now have to be resolved by the Court. App., *infra*, 34, 39.

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH CIRCUIT'S LIMITED APPLICATION OF TITLE III OF THE ADA, TO COVER ONLY PHYSICAL ACCESS BY DISABLED INDIVIDUALS TO STRUCTURES, DIRECTLY CONFLICTS WITH THE VIEW OF THE FIRST CIRCUIT, AS WELL AS DEPARTMENT OF JUSTICE REGULATIONS AND INTERPRETATION OF THE ACT, HOLDING THAT THE ADA COVERS ACCESS TO INSURANCE THROUGH PUBLIC ACCOMMODATIONS OTHER THAN PHYSICAL STRUCTURES AND PROHIBITS DISCRIMINATION BASED ON DISABILITY NOT ONLY IN PROVIDING ACCESS TO, BUT ALSO IN THE CONTENTS OF, INSURANCE PRODUCTS.

A. The Holding of the Sixth Circuit That the ADA Secures Equal Access Only to Public Accommodations Which Are Physical Places or Structures Is in Conflict with the First Circuit.

In construing the ADA narrowly to exclude Parker's claims under Title III, the Sixth Circuit expressly rejects

the view taken by the First Circuit in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994). Carparts held that to " . . . limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent. . . . " *Id.* at 20. The court below reviewed the provisions of 42 U.S.C. § 12181(7)(F) and acknowledged that " . . . an insurance office is a public accommodation. . . . " App., *infra*, 10. The court concluded, however, that since "Parker did not access her policy from MetLife's insurance office . . . " the " . . . policy Parker obtained is not covered by Title III because Title III covers only physical places." App., *infra*, 11-12. The Sixth Circuit relied upon its decision in *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580 (6th Cir. 1995), to conclude that application of Title III of the ADA is limited to physical access to "places" of public accommodation. In *Stoutenborough*, a hearing impaired plaintiff charged that the National Football League's "blackout rule" denied equal access to football games by hearing impaired persons which would otherwise be available through local live telecasts, but the court ruled that the broadcasts did not involve a place of public accommodation.[1]

---

[1] Significantly, the author of the *Stoutenboroug* opinion dissented from the *en banc* decision in the present case, asserting that the majority incorrectly applied *Stoutenborough* because, unlike that case, the present case involves goods or services, namely insurance, of a type available through one of the places of public accommodation expressly identified in the statute, namely an insurance office.

The decision from which appeal is sought turns upon a construction of the term "place of public accommodation" in Title III of the ADA which is so narrow that it would exclude, for example, an Internet web site, a telemarketing operation, or a place from which a bulk mail solicitation of the public is conducted, and which would, therefore, permit insurers to discriminate against the disabled so long as they do not do so in a "physical place where services may be obtained." App., *infra*, 19. By such reasoning, the court concluded that Petitioner's long-term disability plan does not fall within the purview of title III of the ADA because it was provided through an employer and administered by an insurance company in a manner which did not involve use of a physical place, i.e. an office, which "the public" could "enter" to "obtain" the long-term disability policy that Petitioner obtained. App., *infra*, 11-12, 20.

In contrast to the Sixth Circuit's strained reading of the Act, the First Circuit in *Carparts* observed that, "It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same service over the telephone or by mail are not. Congress could not have intended such an absurd result." *Carparts*, 37 F.3d at 19. Similarly Chief Judge Martin, dissenting from the majority in the present case, correctly states:

> By limiting Title III's applicability to physical structures, the majority interprets Title III in a manner completely at odds with clear congressional intent. In recent years, the economic and social mainstream of American life has experienced significant change due to technological

> advances. An increasing array of products and services are becoming available for purchase by telephone order, through the mail, via the Internet, and other communications media. Unfortunately, under the majority view, the same technological advances that have offered disabled individuals unprecedented freedom may now operate to deprive them of rights that Title III would otherwise guarantee. As the modern economy increases the percentage of goods and services available through a marketplace that does not consist of physical structures, the protections of Title III will become increasingly diluted.

App., *infra*, 34.

The majority of the court below was not precluded by the statutory language from extending the protection of the ADA to a disabled individual such as Petitioner; she was no less a member of the "public" in relation to Respondent MetLife than would be a person entering its offices from the street, and certainly the Respondents used "insurance offices" in order to "accommodate" the insurance needs of customers such as Petitioner in purchasing long-term disability insurance. In denying Petitioner relief under the statute, the Sixth Circuit majority simply chose not to follow the well settled principle of law that remedial statutes are to be interpreted broadly to further the underlying purpose of such statutes. *Jefferson County Pharmaceutical Assn. v. Abbott Labs*, 460 U.S. 150, 159 (1983); *Gomez v. Toledo*, 446 U.S. 635, 639 (1980).

B. The Sixth Circuit's Holding That the ADA Does Not Reach Disability Based Discrimination in the Terms and Conditions of Insurance Products or Services Is at Odds with the First Circuit in *Carparts* and Other Decisions under the Authority of *Carparts*.

The decision of the court below is in further conflict with *Carparts* and with decisions under the authority of *Carparts* in holding " . . . Title III does not govern the content of a long-term disability policy offered by an employer . . . " on the ground that " . . . Title III regulates the availability of goods and services the place of public accommodation offers as opposed to the contents of goods and services offered by the public accommodation." App., *infra*, 13. Although it did not reach the issue, Carparts expressly did not preclude examination of the contents of insurance products under Title III. *Carparts*, 37 F.3d at 19. As noted by the court in *Doukas v. Metropolitan Life Ins. Co.*, 950 F.Supp. 422, 426 (D.N.H. 1996), decided under the authority of *Carparts*, the broad wording and diversity of the specific prohibitions set forth in Title III " . . . are a strong indication that Title III was intended to extend beyond mere access or availability of a good or service." 42 U.S.C. § 12182(b)(2)(A)(i)-(iii).

Equally strong confirmation of the intent of Congress to include the contents of insurance products and services within the purview of the ADA is found in the enactment of Title IV of the Act. This section, expressly captioned "Insurance," creates a limited "safe harbor" for certain insurance practices which otherwise could constitute discrimination against disabled persons in violation of Titles I, II, and III of the Act. Title IV states in pertinent part:

> [Titles] I through III . . . shall not be construed to prohibit or restrict . . . an insuror . . . or any agent, or entity that administers benefit plans . . . from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law.

42 U.S.C. § 12201(c). *See also* 28 C.F.R. § 36.212. It is reasonable to infer from enactment of this section of the ADA that Congress would not have included it if Congress did not intend for the contents of insurance products to be subject to scrutiny under Titles I through III of the Act. Specifically, if the broad language of Title III of the Act did not apply to the contents of insurance products and services, then Congress would have had no need to expressly exempt, by means of the "safe harbor" provision in Title IV, some insurance practices which might otherwise be discriminatory under title III. *Kotev v. First Colony Life Ins. Co.*, 927 F.Supp. 1316, 1321 (C.D. Cal. 1996).

The "safe harbor" provision in Title IV is conditional; it does not nullify Title III's prohibition of discrimination based upon disability in the terms and conditions of insurance policies. Rather, the "safe harbor" is available to insurers only to the extent that their practices are based upon and not inconsistent with State law and that they do not use the "safe harbor" provisions in Title IV as a subterfuge to evade the purposes of Titles I and III. 42 U.S.C. § 12201(c).

The opinion from which Petitioner seeks to appeal recognizes that the contents of insurance products are addressed by the ADA. The majority of the court below, however, by restricting the reach of Title III to physical

places, excluded Petitioner's long-term disability insurance from consideration under the Act altogether, thereby frustrating the clear import of Title IV. The court said:

> While Title IV of the ADA, 42 U.S.C. § 12201(c), may address the contents of insurance policies provided by a public accommodation, Title IV does not address the contents of a long-term disability plan offered by an employer because it is not a place of public accommodation. We, therefore, disagree with the First Circuit's decision in *Carparts* . . . .

App., *infra*, 15-17. This construction of the statute departs from the Court's requirement to construe statutes to "avoid rendering superfluous any parts thereof." *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104,112 (1991).

Resolving these fundamental conflicts between circuits is essential to assure uniform rational application of the ADA in cases such as *Parker* and *Carparts* involving insurance and the disabled. The ADA was enacted in 1990, and already numerous cases presenting the issue of the statute's applicability to discrimination in the provision and coverage of insurance have been reported. *See, e.g., Attar v. Unum Life ins. Co.*, 1997 WL 446439 at 11-12 (N.D. Tex. 1997); *World Ins. Co. v. Branch*, 966 F.Supp. 1203, 1207 (N.D. Ga. 1997); *Cloutier v. Prudential Ins. Co. of America*, 964 F.Supp. 299, 301-302 (N.D. Cal. 1997); *Doukas v. Metropolitan Life Ins. Co.*, 950 F.Supp. 422, 425 (D. N.H. 1996); *Kotev v. First Colony Life Ins. Co.*, 927 F.Supp. 1316, 1321 (C.D. Cal. 1996); *Anderson v. Gus Mayer Boston Store*, 924 F.Supp. 763 (E.D. Tex. 1996); *Piquard v. City of East Peoria*, 887 F.Supp. 1106 (C.D. Ill. 1995); *Baker v. Hartford Life Ins. Co.*, 1995 WL 573430 (N.D. Ill. 1995).

In all the foregoing cases, district courts have held that Title III reaches disability based discrimination in the terms and conditions of insurance products or services, including those provided through employer sponsored group benefit plans (*see Anderson, supra,* and *Piquard, supra*). The number of such cases which have been reported or are pending, as well as the interest shown by amici curiae and others in the course of the Petitioner's case, illustrate the importance of granting the writ. Because the approaches taken by the First Circuit and the Sixth Circuit are so starkly in conflict, the Court has a singular opportunity in this instance to articulate the issues in a way which will settle the law in this area and serve the uniform administration of justice in the large number of cases of this kind which will undoubtedly arise in the future.

C. The Decision of the Court Below Does Not Give Due Deference to the Authoritative Position of the Department of Justice.

The decision of the court of appeals, further, is in conflict with the interpretive guidance of the Department of Justice with regard to Title III of the ADA. Congress has charged the Department of Justice with enforcement of the ADA. 42 U.S.C. § 12188(b). In execution of this responsibility the Department of Justice has issued regulations and a Technical Assistance Manual interpreting Title III. See 28 C.F.R. pt. 36 (1996); DOJ Technical Assistance Manual § III-3.11000, reprinted in Americans With Disabilities Act Manual (BNA) at 90:0917. The opinion of

the court below *en banc* pays lip service to the Department of Justice regulations, quoting an irrelevant provision to the effect that Title III of the ADA does not require a retail business open to the public to carry products for the disabled in its inventory mix, e.g., a bookstore is not required to carry Brailled or large print books. The opinion then casts aside in a footnote the relevant portions of the Technical Assistance Manual which directly address the issue. The court said:

> The Department of Justice has . . . interpreted Title III to include regulation of the substantive terms of insurance contracts . . . . That provision of the technical assistance manual provides:
>
> > Insurance offices are places of public accommodation and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts they offer.
> >
> > . . .
>
> As this interpretation is inconsistent with its regulations and the statutory text of Title IV, we decline to adopt it.

App., *infra*, 14-15.

In view of the express delegation by Congress to the Department of Justice of authority to promulgate binding regulations interpreting Title III, the Department of Justice regulations and interpretive guidance pertaining to the Title III issues presented in this case must be given "legislative and hence controlling weight unless they are arbitrary, capricious, or clearly contrary to the statute."

United States v. Morton, 467 U.S. 822, 834 (1984); accord *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994), citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). The technical Assistance Manual is also entitled to substantial deference. See *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 n.8 (2nd Cir. 1997); *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 587 (D.C. Cir. 1997) (Technical Assistance Manual represents "authoritative departmental position").

The interpolation of a supposed inconsistency between the regulations and the Technical Assistance Manual by the court below, when none exists, disregards the authoritative position of the Department of Justice with regard to the issue presented. Contrary to the opinion of the majority of the court below *en banc*, the regulations at 28 C.F.R. Ch.1, pt.36, App. B. at 630-631 (1996), stating that Title III does not require a private entity operating a public accommodation to alter its inventory mix to include special goods for the disabled, are completely consistent with the Department of Justice interpretation in the Technical Assistance Manual applying Title III to the content of insurance policies. The interpretive guidance does not suggest that an insurer must change the mix of its insurance products or services to comply with the statute, but states that Title III of the statute does reach insurance products which an insurer decides to sell and prohibits unjustified discrimination based on disability in the terms and conditions upon which such insurance is offered.

The Court, in exercise of its supervisory authority, should grant the writ sought by Petitioner in this case in

order to correct the Sixth Circuit's failure to give appropriate deference to the Department of Justice regulations and interpretive guidance.

D. The Sixth Circuit's Decision Is Contrary to the Expressed Intent of Congress in the ADA.

The intent of Congress expressed in the ADA is to " . . . address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. §12101(b)(4). The statutory purpose is to " . . . provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12101(b)(1). The legislative history of the ADA corroborates the intent of Congress to " . . . bring individuals with disabilities into the economic and social mainstream of American life." H.R. Rep. No. 485, 101st Cong., 2nd Sess., pt.II, at 99 (1990); accord S. Rep. No. 116, 101st Cong., 1st Sess., at 58 (1989). As Judge Merritt observed in the panel opinion which was vacated by the court below *en banc*:

> There could hardly be a "good" or "service" more central to the day-to-day life of a seriously disabled person than insurance – for it is often insurance coverage that will determine a disabled person's ability to prevent the disability from limiting his or her participation in society.

App., *infra*, 66.

The decision from which appeal is sought in this case frustrates the expressed intent of Congress and denies to

Petitioner recourse under the statute to obtain review of the disability based classification in her long-term disability insurance coverage, to ascertain whether it is justified by " . . . sound actuarial principles or . . . actual or reasonably anticipated experience." H.R. Rep. No.485, 101st Cong., 2nd Sess., pt. III, at 70 (1990); S. Rep No. 116, 101st Cong., 1st Sess., at 84-86 (1989). If the distinction upon which her long-term disability benefits were terminated warrants scrutiny to determine whether it is so justified and if it appears that such denial of benefits may not be rational, but rather may (as she contends) be rooted in outdated stigma toward the mentally disabled, then justice requires that the mandate of the ADA be fulfilled in her case by a grant of the writ she seeks and further appellate review by the Court.[2]

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[2] The legislative history clearly reflects that such scrutiny under the ADA was contemplated by Congress:

> Under the [ADA], a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based in disability alone, if the disability does not impose increased risks.
>
> . . .
>
> Moreover, while a plan which limits certain kinds of coverage based on classification of risk would be allowed under [42 U.S.C. § 12201 (c)], the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

H.R. Rep. No. 485, 101st Cong., 2nd Sess. pt. II, at 136-37 (1990).

II.

THE SIXTH CIRCUIT'S DENIAL OF RELIEF UNDER TITLE I OF THE ADA DEPARTS FROM THE HISTORIC GUIDANCE OF THE COURT CONSTRUING STATUTES INTENDED TO SECURE THE CIVIL RIGHTS OF INDIVIDUALS, AND ONLY REVIEW BY THE COURT IN THIS CASE OF FIRST IMPRESSION CAN ASSURE IMPLEMENTATION OF THE INTENT OF CONGRESS CONSISTENT WITH THE COURT'S PRECEDENT AUTHORITY.

Not only with regard to the Title III issues presented, but also with regard to the Sixth Circuit's denial to Petitioner of coverage under Title I of the ADA, this case of first impression affords the Court an historic opportunity to bring uniformity and certainty to this area of the law. The ADA comes in the line of congressional enactments intended to secure the civil rights of individuals in various facets of the national life upon which the Court has already spoken extensively. The Sixth Circuit's denial to Petitioner of recognition of her claims under Title I as well as Title III of the ADA is contrary to the Court's precedent authority.

A. Petitioner's Cause of Action Should Be Allowed Under Title I of the ADA Because an Employee Who Becomes Totally Disabled and Is, As a Result Eligible for Post-Employment Benefits Is Entitled to Recourse Under the Statute If Benefits Are Denied Due to Disability Based Discrimination.

The Sixth Circuit concluded that Petitioner's cause of action was not cognizable under Title I of the ADA in reliance primarily upon the decision in *Beauford v. Father*

Flanagan Boys' Home, 831 F.2d 768 (8th Cir. 1987), *cert. denied*, 485 U.S. 938 (1988), interpreting the Rehabilitation Act of 1973, 29 U.S.C § 794. Since Congress mandated that agencies enforcing the ADA should develop the same standards and requirements for both the Rehabilitation Act and the ADA, the court below followed the reasoning of *Beauford* to hold that an individual such as Petitioner, who is totally disabled, is not a "qualified individual with a disability" because such a person cannot "perform the essential functions of the employment position that such individual holds or desires" and, therefore, cannot bring an action as an "employee" within the meaning of the statute. 42 U.S.C. § 12111(4), (8).

The reliance of the court below on *Beauford* to decide Petitioner's case is misplaced. Although similar in that it concerned entitlement to insurance benefits claimed by a totally disabled employee, Petitioner's case differs from *Beauford* in that the Rehabilitation Act, unlike the ADA does not contain provisions extending to " . . . a contractual or other arrangement or relationship which has the effect of subjecting a covered entity's qualified applicant or employee with a disability to . . . discrimination," including "a relationship with . . . an organization providing fringe benefits . . . . " 42 U.S.C. § 12112(b)(2). The Rehabilitation Act is narrower in scope and purpose than the ADA, which is intended to, among other things, enable individuals with disabilities to achieve "independent living and economic self-sufficiency." 42 U.S.C. § 12101(a) The ADA goes beyond the Rehabilitation Act by specifically addressing insurance coverage and prohibiting an employer or insurer from using subterfuge to avoid the requirements of the Act. Compare 29 U.S.C. 794

and 42 U.S.C. § 12201. The Rehabilitation Act has no language dealing directly with insurance.

The decision in *Beauford* and the holding of the court below are not in harmony with the Court's recent decision in *Robinson v. Shell Oil Co.*, 117 S.Ct. 843 (1997). In *Robinson* the Court held that the term "employees" as used in Section 704(a) of Title VII includes former employees and that Title VII protected a former employee from an adverse post-employment action taken in retaliation for bringing a charge of discriminatory discharge against his former employer. The Court reasoned that excluding former employees from coverage under the statute would undermine its effectiveness by allowing the threat of post-employment retaliation to deter victims of discrimination from seeking relief under the statute, providing a perverse incentive for former employers to fire employees who might bring Title VII Claims.

In *Robinson*, the Court considered the question "whether the term 'employees,' as used in [Title VII of the Civil Rights Act of 1964] includes former employees," and acknowledged that "[a]t first blush, the term 'employees' . . . would seem to refer to those having an existing employment relationship with the employer in question." *Id.* at 845-46. The Court observed that, "[t]his initial impression" does "not withstand scrutiny in the context of [the statute as a whole]." *Id.* at 846. The Court noted that "there is no temporal qualifier in the statute such as would make plain that [the anti-retaliation provision in the statute] protects only persons still employed at the time of the retaliation." *Id.* The Court concluded that the term "employees" in the statute did not have "some

intrinsically plain meaning" that rendered it unambiguous and, therefore, that the term was properly read in light of the purpose and broader context of the statute, to include "former employees within the scope of 'employees' protected by [the statute]." *Id.* at 847 n. 4,848.

The definition of the term "employee" in the ADA is identical to that provided under Title VII: "an individual employed by an employer." 42 U.S.C. § 12111(4); 42 U.S.C. § 2000e(f). The Court in *Robinson* concluded that inclusion of former employees within the scope of this definition was coherent and consistent with a primary purpose of providing unfettered access to the remedial mechanisms contained in the statute. *Id.* The Court's rationale supports the appellant's position in the case at bar that a former employee such as appellant who meets the eligibility requirements to receive a post-employment fringe benefit is a qualified person with a disability and has standing under a qualified person with a disability and has standing under Title I of the ADA to challenge disability based distinctions in the long term disability plan under which her coverage was terminated, an interpretation of the Act's coverage which is implicit in its broader context and the legislative purposes of the ADA.

Robinson addresses directly the issue presented under Title I of the Act in this case, and review by the Court of the Sixth Circuit's decision in this case is necessary to extend to the ADA the same principles of statutory construction to secure civil rights within the full intent of Congress which were applied in Robinson. As in Robinson, "at first blush" Title I the ADA might be read,

as held by the court below, to apply only to those disabled persons who are presently able to perform the essential functions of their job. Yet, as in the case of *Robinson*, the ADA lacks any "temporal qualifier . . . such as would make plain" that the statute, in all cases, protects only persons who are currently able to perform the essential functions of their job. Just as the reference to an individual "employed by an employer" in Title VII does not plainly require the individual to be in an existing employment relationship at the time of the alleged discrimination to be covered by the statute, so also the reference to a "qualified person with a disability" used in the ADA does not plainly require that the individual be "qualified" in the sense of being able to perform the essential functions of his or her job at the time of the alleged discrimination, where the discrimination arises in the context of employment related benefits for which the individual is eligible because of his or her previous status as a "qualified individual." The ADA does not unambiguously demand that in individual's status as a "qualified individual" must coincide temporally with the moment when he or she becomes disabled and is subjected to allegedly discriminatory provisions in an insurance benefit plan.

As the Court did in *Robinson*, the Sixth Circuit should have examined the issue of Petitioner's right to bring suit under Title I in the context of the ADA's broader meaning and purpose of the statute as a whole. The ADA was enacted to provide "a comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The Act clearly extends to employment related benefits. 42 U.S.C.

§ 12101(a)(5). The Act makes specific reference to "fringe benefits" in its definition of the term "discriminate." 42 U.S.C. § 12112(b)(2). It is "undisputed that fringe benefits . . . are one set of the 'terms, conditions, and privileges of employment' protected from unlawful discrimination under [Title I] of the ADA." *Gonzales v. Garner Food Service*, 89 F.3d 1523, 1526 (11th Cir. 1996), *cert. denied*, 65 USLW 3766 (May 19, 1997).

It is impossible to reconcile a requirement that an individual to able to perform the essential functions of her job at the time she is receiving a fringe benefit such as long term disability insurance. The Court has previously held that pension benefits qualify as "terms, conditions, or privileges of employment" under Title VII even though they are received only after employment terminates. *Hishon v. King & Spalding*, 467 U.S. 69, 77 (1984). The narrow application of Title I by the Sixth Circuit in this case would effectively write out of the broad mandate of Congress whole areas involving fringe benefits which are of utmost importance to the disabled. If the reasoning of Robinson is applied in this case, nothing in the Act suggest that Congress intended such a result.

B. The holding of the Sixth Circuit on Petitioner's Title I Claims Is At Odds with Principles of Statutory Construction Set Forth by the Court.

The Court has stated that, to ascertain the "plain meaning of the statute," a court must look "to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The court below in

this case has focused so intently upon the single phrase defining a "qualified individual with a disability" that it has lost sight of the language and design of the statute as a whole. By doing so, it has reached a result which is "demonstrably at odds with the intentions of [the statute's] drafters." *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). *See also Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989)(Scalia, J., concurring) (stating that a court must follow the unambiguous terms of a statute except where the literal reading of the statute leads to an absurd or irrational result).

Petitioner was fully qualified to perform the essential functions of her job throughout the period of her active employment, by virtue of which she qualified and became eligible for the fringe benefit at issue in this case, namely long term disability benefits. Nothing in the "plain language" of the Act, taken as a whole and in the context of the congressional mandate pursuant to which it was enacted, requires the absurd or irrational result of denying Petitioner recourse under the statute, a result which is demonstrably at odds with the intentions of the drafters of the ADA. Under the strained construction given to Title I by the court below, disability benefits could never be subjected to scrutiny under the ADA: an employee such as Petitioner could not bring such an action because she is totally disabled and, therefore, not currently able to perform the essential functions of her job; similarly, a "qualified individual" who is able to perform the essential functions of her job would be unable to challenge the discrimination because such individual would not be disabled so as to be eligible for the benefits. The Court alone has the power to remedy this

absurdity and should, therefore, grant the writ in this case.

C. The Decision of the Sixth Circuit as to Petitioner's Title I Claims Is at Odds with Regulations Promulgated by the EEOC.

Just as Congress gave to the Department of Justice enforcement authority with respect to Title III of the ADA, the Equal Employment Opportunity Commission ("EEOC") has promulgated regulations pertaining to Title I of the ADA pursuant to its regulatory mandate with regard to that part of the Act. 29 C.F.R. § 1630. These regulations provide, in pertinent part, that it shall be unlawful for an employer to discriminate against a qualified individual with a disability in regard to "[f]ringe benefits available by virtue of employment, whether or not administered by the [employer]." 29 C.F.R. § 1630.4(f). The EEOC takes the position that, under Title I, an individual's present ability to perform the essential functions of his or her job is irrelevant to the inquiry whether he or she is entitled to recourse under Title I for discrimination based on disablilty in the administration of such benefits. 29 C.F.R. § 1630.13. The Sixth Circuit improperly declines to give due deference to the regulations promulgated by the EEOC under Title I. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984).

III

THE DECISION OF THE SIXTH CIRCUIT IS IN ERROR AND DENIES PETITIONER SUBSTANTIVE RELIEF TO WHICH SHE IS ENTITLED.

Not only did the Sixth Circuit err in holding that Title III of the ADA applies only to equal access by the disabled to physical places or structures, that the contents of insurance products are beyond scrutiny under its provisions, and that the Petitioner could not bring her claims under Title I because she was totally disabled; the court below is in error, further, in holding that the ADA applies only to discrimination between the disabled and the non-disabled and in suggesting that, in order for an insurer to trigger the subterfuge provision in Title IV of the Act, there must be a specific intent to discriminate.

A. The Prejudicial Classification Made Between Mental and Physical Disabilities in Petitioner's Long Term Disability Insurance Plan Constitutes Disability Based Discrimination.

The ADA without question applies not only to discrimination between the disabled and non-disabled, but also to discrimination based upon different classifications of disability. The act provides in pertinent part:

> It shall be discriminatory to subject an individual or *class of individuals* on the basis of a disability *or disabilities* of such individual or class, directly, *or through contractual,* licensing, or other arrangements, to a denial of the *opportunity* of the individual or class to participate in

> or *benefit from* the *goods*, services, facilities, privileges, advantages, or accommodations *of an entity*.

42 U.S.C. Section 12182(b)(1)(A)(i) (emphasis supplied). The clear intent of this provision is to prohibit a covered entity from taking disability or disabilities "into account" in granting or denying such benefits. Cf. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-45 (1989) (such language in Title VII prohibiting employer from taking race or gender "into account").

Most telling in the statutory language is the use of the phrase " . . . class of individuals on the basis of disability or disabilities . . . . " Had Congress intended to limit the Act to discrimination only between the disabled and nondisabled, it would have made no mention of classes of individual or of disability "or disabilities" in its articulation of the Act's scope. The court below, again relying on the more limited content of the Rehabilitation Act, as applied in *Alexander v. Choate*, 469 U.S. 287 (1985) and *Turnage v. Traynor*, 485 U.S. 535 (1988), has erred in reducing the application of the ADA despite its broader mandate and more comprehensive scope and language. The Court should grant the writ prayed for in this petition in order to correct the error of the court below and clarify the distinction between the ADA and the Rehabilitation Act in this regard.

CONCLUSION

The Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

KAYE G. BURSON
Counsel of Record
ROGER K. RUTLEDGE
RUTLEDGE & RUTLEDGE, P.C.
1053 West Rex Road, Suite 101
Memphis, Tennessee 38119
901/682-0667

Attorneys for Petitioner

Date: October 29, 1997

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

OUIDA SUE PARKER, *Plaintiff-Appellant,* *v.* METROPOLITAN LIFE INSURANCE COMPANY, SCHERING-PLOUGH CORPORATION, and SCHERING-PLOUGH HEALTH CARE PRODUCTS, INC., *Defendants-Appellees.*	)	No. 95-5269

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 94-02155 – Jon Phipps McCalla, District Judge.

Argued: April 23, 1997

Decided and Filed: August 1, 1997

Before: MARTIN, Chief Judge, MERRITT, KENNEDY, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE, and COLE, Circuit Judges.

COUNSEL

ARGUED: Kaye G. Burson, RUTLEDGE & RUTLEDGE, Memphis, Tennessee, for Appellant. Ronald S. Rauchberg, PROSKAUER, ROSE, GOETZ & MENDELSOHN, New York, New York, Frederick J. Lewis, McKNIGHT, HUDSON, LEWIS & HENDERSON, Memphis, Tennessee, for

Appellee. **ON BRIEF:** Roger K. Rutledge, Kaye G. Burson, RUTLEDGE & RUTLEDGE, Memphis, Tennessee, for Appellant. Ronald S. Rauchberg, PROSKAUER, ROSE, GOETZ & MENDELSOHN, New York, New York, Allan M. Marcus, METROPOLITAN LIFE INSURANCE COMPANY, New York, New York, Frederick J. Lewis, Nicole Marie Walthour, McKNIGHT, HUDSON, LEWIS & HENDERSON, Memphis, Tennessee, for Appellee. Gregory B. Stites, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, Kansas City, Missouri, Ronald S. Cooper, STEPTOE & JOHNSON, Washington, D.C., Patrick W. Shea, PAUL, HASTINGS, JANOFSKY & WALKER, Stamford, Connecticut, Jaime R. Ebenstein, J.R. EBENSTEIN CONSULTANTS, Valparaiso, Indiana, Glenn Felton, Chattanooga, Tennessee, Susan G. Riseman, Worcester, Massachusetts, Ann E. Reesman, McGUINESS & WILLIAMS, Washington, D.C., Patricia A. Dunn, JONES, DAY, REAVIS & POGUE, Washington, D.C., David M. Selcer, BAKER & HOSTETLER, Columbus, Ohio, for Amici Curiae.

KENNEDY, J., delivered the opinion of the court, in which NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, and BATCHELDER, JJ., joined. MARTIN, C. J. (pp. 28-30) and MERRITT, J. (pp. 31-36), delivered separate dissenting opinions, in which MOORE, J., joined, with Chief Judge MARTIN and Judges DAUGHTREY and COLE also joining in Judge MERRITT'S dissent.

OPINION

KENNEDY, Circuit Judge. Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12182-12189 ("ADA"), prohibits discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation. In the instant case, we are asked to determine whether Title III of the ADA prohibits an employer from providing to its employees a long-term disability plan issued by an insurance company which contains longer benefits for employees who become disabled due to a physical illness than for those who become disabled due to a mental illness. For the reasons set forth below, we conclude that such a distinction is not prohibited.

I.

Plaintiff, Ouida Sue Parker, was employed by Schering-Plough Health Care Products, Inc. ("Schering-Plough") from April 20, 1981 through October 29, 1990. During her employment, Parker participated in a long-term disability plan offered by Schering-Plough to its employees; the plan was issued by Metropolitan Life Insurance Co. ("MetLife"). Under the plan, an individual who is deemed to be totally disabled due to a mental or nervous disorder may receive benefits for up to twenty-four months, unless at the termination of the twenty-four

month period, the individual was hospitalized or receiving inpatient care for the disorder. For physical disorders, however, the plan provides for benefits until the individual reaches sixty-five years of age.

On October 29, 1990, Parker became disabled due to severe depression. On April 29, 1991, Parker began to receive benefit payments under the plan. Because Parker suffered from a mental disorder, Schering-Plough terminated her payments twenty-four months later, on April 28, 1993, pursuant to the terms of the plan. Following Schering-Plough's denial of two administrative appeals filed by Parker, plaintiff filed this action alleging violations of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, and the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 ("ERISA"). The District Court granted the defendants' motion for summary judgment. The District Court first found that Parker did not have standing to sue under Title I of the ADA, 42 U.S.C. §§ 12111-12117, because only a "qualified individual with a disability" may obtain relief under Title I and Parker was not a "qualified individual with a disability" when her benefits were terminated because her disorder prevented her from performing the essential functions of her employment position. The District Court also dismissed Parker's claim against the defendants under Title III of the ADA, 42 U.S.C. §§ 12165-12189. MetLife was not a proper defendant under Title III, the court concluded, because Title III only covers discrimination in the physical access to goods and services, not discrimination in the terms of insurance policies. The Title III claim against Schering-Plough, Parker's employer, was dismissed because Title I, not Title III, governs discrimination in

employment practices. Because Parker was not a qualified individual under Title I, a suit against her employer could not be maintained under the ADA. Lastly, the District Court granted summary judgment in favor of the defendants on Parker's ERISA claim because the classification of her disorder as "nervous/mental" was not arbitrary or capricious.

On appeal from the District Court's order, a panel of this Court affirmed the District Court's judgment as to Parker's ERISA claim[1] and Title I claim under the ADA.[2] The panel, however, reversed the District Court's judgment as to plaintiff's claim under Title III of the ADA. Disagreeing with the District Court, the panel concluded that Title III "prohibits discrimination in the contents of the goods and services offered at places of public accommodation, rather than just discrimination in terms of physical access to places of public accommodation." *Parker v. Metropolitan Life Ins. Co.*, 99 F.3d 181, 187 (6th Cir. 1996). Accordingly, the panel found that Title III covers insurance products because "insurance products are 'goods' or 'services' provided by a 'person' who owns a 'public accommodation.' " *Id.* at 188.

Because the panel concluded that the contents of insurance products are governed by Title III, it then turned to whether Title IV of the ADA, 42 U.S.C. § 12201(c),

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[1] Neither party sought rehearing on the disposition of Parker's ERISA claim.

[2] Although Parker discusses her Title I claim in her briefing to the *en banc* court, Parker did not seek rehearing on the disposition of her Title I claim.

commonly referred to as the "safe harbor provision," precluded application of Title III to insurance products. The panel concluded that the safe harbor provision was ambiguous on its face as to whether it intended to exempt insurance products from ADA coverage. It, therefore, looked to legislative history for guidance. The panel concluded that the legislative history indicated that "insurance practices are protected by the 'safe harbor' provision, but only to the extent that they are consistent with 'sound actuarial principles,' 'actual reasonably anticipated experience,' and 'bona fide risk classification.' " *Parker*, 99 F.3d at 191. Responding to the defendants' argument that an insurance plan violates the ADA only if it is a "subterfuge" under § 12201(c), the panel declined to adopt the Supreme Court's definition of subterfuge pronounced in *Ohio Public Employees Retirement System v. Betts*, 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989). In *Betts*, the Court defined the term subterfuge in the Age Discrimination in Employment Act ("ADEA") as an intent to discriminate. *See Betts*, 492 U.S. at 158, 109 S.Ct. at 2856. Declining to follow the ADEA definition of subterfuge, the panel held that an insurance plan is a subterfuge under the ADA if it is "based on speculation, and not on sound actuarial principles, actual or reasonably anticipated experience, or bona fide risk classification." *Parker*, 99 F.3d at 191-92.

Finally, in response to Schering-Plough's contention that Title I, not Title III, governs employment practices, the panel held that "based on our affirmance of Plaintiff's Title I claim, it is not clear whether Schering remains a proper defendant to the remaining claim [Title III] of this suit." *Parker*, 99 F.3d at 194. The panel did not resolve this

question of law; rather, it instructed the lower court that the issue was ripe for its determination on remand. *Id.*

Following the panel's decision, the defendants sought rehearing *en banc* on the panel's disposition of Parker's Title III claim. We granted their petition and vacated our prior judgment. *See Parker v. Metropolitan Life Ins. Co.*, 107 F.3d 359 (6th Cir. 1997). Accordingly, the case is again before us for our determination. Upon review, we conclude that the judgment of the District Court will be **AFFIRMED**.

II.

Our standard of review of a grant of summary judgment is *de novo;* we use the same test as used by the district court. *See Brooks v. American Broadcasting Cos.*, 932 F.2d 495, 500 (6th Cir. 1991). Summary judgment is proper if the evidence " 'show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to [a] judgment as a matter of law.' " *See* Fed. R. Civ. P. 56(c); *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 601 (6th Cir. 1988) (quoting Fed. R. Civ. P. 56(c)).

III.

A. Title III: Places of Public Accommodation

To determine whether a benefit plan provided by an employer falls within the prohibitions of Title III, we must begin by examining the statutory text. *See United States v. Gonzales*, 117 S. Ct. 1032, 1034 (1997); *Kurinsky v. United States*, 33 F.3d 594, 596 (6th Cir. 1994) (citing *United States v.*

Johnson, 855 F.2d 299 (6th Cir. 1988)), *cert. denied*, 115 S. Ct. 1793, 514 U.S. 1082, 131 L.Ed.2d 721 (1995). The ADA generally prohibits discrimination against the disabled by employers, public entities, and by operators of public accommodations. *See* 42 U.S.C. §§ 12101-12213. Title III of the ADA specifically addresses discrimination by owners, lessors, and operators of public accommodations. It provides as follows:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a).

Section 12181 sets forth the following list of private entities that are considered public accommodations for purposes of Title III:

> **(A)** an inn, hotel, motel, or other place of lodging . . .
>
> **(B)** a restaurant, bar, or other establishment serving food or drink;
>
> **(C)** a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
>
> **(D)** an auditorium, convention center, lecture hall, or other place of public gathering;
>
> **(E)** a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
>
> **(F)** a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair

service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, *insurance office*, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7) (emphasis added).

Title III specifically prohibits, *inter alia*, the provision of unequal or separate benefits by a place of public accommodation. *See* 42 U.S.C. §§ 12182(b)(1)(A)(i)-(iii). For example, 42 U.S.C. § 12182(b)(1)(A)(ii) provides that it is "discriminatory to afford an individual or class of individuals, on the basis of a disability . . . with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals . . . " 42 U.S.C. § 12182(b)(1)(a)(ii). To the extent that subsections (i), (ii), and (iii) do not explicitly state that they apply only to public accommodations, subsection (iv)

expressly provides that " . . . the term 'individual or class of individuals' refers to the clients or customers of the covered public accommodation . . . " 42 U.S.C. § 12182(b)(1)(a)(iv).

While we agree that an insurance office is a public accommodation as expressly set forth in § 12181(7), plaintiff did not seek the goods and services of an insurance office. Rather, Parker accessed a benefit plan provided by her private employer and issued by MetLife. A benefit plan offered by an employer is not a good offered by a place of public accommodation. As is evident by § 12187(7), a public accommodation is a physical place and this Court has previously so held. In *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580 (6th Cir.), *cert. denied*, 116 S. Ct. 674, 133 L.Ed.2d 523 (1995), Thomas Stoutenborough and an association of hearing impaired persons filed suit against the National Football League ("NFL") and several television stations under Title III of the ADA alleging that the NFL's "blackout rule" discriminates against them because hearing impaired individuals have no other means of accessing football games when live telecasts are prohibited. They cannot, for example, listen to the broadcast on the radio. *Id.* at 582. To place the blackout rule within the purview of Title III, the plaintiffs argued that they were denied substantially equal access to live television transmissions of football games which is a service of a public accommodation. *Id.*

This Court rejected the plaintiffs' contention holding that the defendants did not fall within any of the twelve categories enumerated in § 12181(7). *Id.* at 583. Furthermore, we held that "the prohibitions of Title III are restricted to 'places' of public accommodation . . . " *Id.* A

"place," as defined by the applicable regulations, is " 'a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the' twelve 'public accommodation' categories." *Id.* (quoting 28 C.F.R. § 36.104). " 'Facility,' in turn, is defined as 'all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.' " *Id.* Although the court acknowledged that the football games were played in a place of accommodation and that the television broadcasts were a service provided by the defendants, the court concluded that the broadcasts "do[ ] not involve a 'place of public accommodation.' " *Id.* Accordingly, we held that the service offered by the defendants did not involve a place of public accommodation. *Id.* Quoting the district court's opinion, we explained that " '[i]t is all of the services which the public accommodation offers, not all services which the lessor of the public accommodation offers which fall within the scope of Title III.' " *Id.* Finally, the court noted that "plaintiffs' argument that the prohibitions of Title III are not solely limited to 'places' of public accommodation contravenes the plain language of the statute." *Id.; see also McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 463 (6th Cir. 1997) (Michigan High School Athletic Association is not a public accommodation); *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1036 (6th Cir. 1995) (same).

Similarly, the good that plaintiff seeks is not offered by a place of public accommodation. The public cannot

enter the office of MetLife or Schering-Plough and obtain the long-term disability policy that plaintiff obtained. Parker did not access her policy from MetLife's insurance office. Rather, she obtained her benefits through her employer. There is, thus, no nexus between the disparity in benefits and the services which MetLife offers to the public from its insurance office.[3] *See, e.g., Pappas v. Bethesda Hosp. Ass'n*, 861 F. Supp. 616 (S.D. Ohio 1994) (no nexus existed between alleged discrimination and any public accommodation under Title III where a nurse was denied health benefits provided by her employer, a hospital, and administered by a benefit services agency).

The Department of Justice's explanation of whether wholesale establishments are places of public accommodation supports our conclusion that MetLife's offering of a disability plan to Schering-Plough is not a service offered by a place of public accommodation. As the Department explains:

> . . . The Department intends for wholesale establishments to be covered . . . as places of public accommodation except in cases where they sell

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[3] Judge Merritt's dissent suggests that our opinion concludes that Parker's disability plan obtained through her employer is not covered by Title III because she physically did not access her policy from MetLife's insurance office. We have not so held. The policy Parker obtained is not covered by Title III because Title III covers only physical places. We have expressed no opinion as to whether a plaintiff must physically enter a public accommodation to bring suit under Title III as opposed to merely accessing, by some other means, a service or good provided by a public accommodation.

> exclusively to other businesses and not to individuals . . . [However], [i]f th[e wholesale company] operates a road side stand where its crops are sold to the public, the road side stand would be a sales establishment covered by the ADA . . .
>
> Of course, a company that operates a place of public accommodation is subject to this part only in the operation of that place of public accommodation. In the example given above, the wholesale produce company that operates a road side stand would be a public accommodation only for the purposes of the operation of that stand. The company would be prohibited from discriminating on the basis of disability in the operation of the road side stand, and it would be required to remove barriers to physical access . . .

28 C.F.R. pt. 36, app. B at 604 (1996). Thus, the offering of disability policies on a discounted rate solely to a business is not a service or good offered by a place of public accommodation.

Furthermore, Title III does not govern the content of a long-term disability policy offered by an employer. The applicable regulations clearly set forth that Title III regulates the availability of the goods and services the place of public accommodation offers as opposed to the contents of goods and services offered by the public accommodation.[4] According to the Department of Justice:

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[4] We, thus, disagree with *Doukas v. Metropolitan Life Ins. Co.*, 950 F. Supp. 422, 426 (D. N.H. 1996) ("The broad wording and diversity of these 'specific prohibitions,' [in § 12182(b)(2)(A)]

> The purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided. In other words, a bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books. Similarly, a video store must make its facilities and rental operations accessible, but is not required to stock closed-captioned video tapes.[5]

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are a strong indication that Title III was intended to extend beyond mere access or availability of a good or service.") and *Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316, 1321 (C.D. Cal. 1996) (following the First Circuit's decision in *Carparts Distrib. Ctr. Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994), the court concluded that Title III is not limited to the mere denial of physical access to places of public accommodation).

[5] The Department of Justice has in other writings interpreted Title III to include regulation of the substantive terms of insurance contracts. *See* DOJ Technical Assistance Manual, § III-3.11000, *reprinted in* Americans with Disabilities Act Manual (BNA) at 90:0917. That provision of the technical assistance manual provides:

> Insurance offices are places of public accommodation and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts they offer. Because of the nature of the insurance business, however, consideration of disability in the sale of insurance contracts does not always constitute "discrimination." An insurer or other public accommodation may underwrite, classify, or administer risks that are based on or not

28 C.F.R. pt. 36, app. B at 630; *see also* 28 C.F.R. § 36.212 (1996).[6] While Title IV of the ADA, 42 U.S.C. § 12201(c),

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> inconsistent with State law, provided that such practices are not used to evade the purposes of the ADA.
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> Thus, a public accommodation may offer a plan that limits certain kinds of coverage based on classification of risk, but may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience. The ADA, therefore, does not prohibit use of legitimate actuarial considerations to justify differential treatment of individuals with disabilities in insurance.

As this interpretation is inconsistent with its regulations and the statutory text of Title IV, we decline to adopt it. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984); *Municipal Resale Serv. Customers v. Federal Energy Regulatory Comm'n*, 43 F.3d 1046, 1053 (6th Cir. 1995).

[6] 28 C.F.R. § 36.212 provides, in part:

> (a) This part shall not be construed to prohibit or restrict –
>
> (1) An insurer . . . from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (2) A person or organization covered by this part from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or

may address the contents of insurance policies provided by a public accommodation,[7] Title IV does not address

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not inconsistent with State law; or

(3) A person or organization covered by this part from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(b) Paragraphs (a)(1), (2), and (3) of this section shall not be used as a subterfuge to evade the purposes of the Act or this part.

[7] Title IV and its accompanying regulations only require that an insurance policy offered by a place of public accommodation be consistent with state law and not a subterfuge to evade the purposes of the ADA to fall within the safe harbor provision. However, it is the opinion of both the Department of Justice and the Equal Employment Opportunity Commission that disparities in insurance policies must be supported by sound actuarial principles. *Compare* 42 U.S.C. § 12201(c) *and* 28 C.F.R. § 36.212 *with* DOJ Technical Assistance Manual, § III-3.11000, *reprinted in* Americans with Disabilities Act Manual (BNA) at 90:0917 *and* EEOC: Interim Policy Guidance on ADA and Health Insurance, June 8, 1993, *reprinted in* Americans With Disabilities Act Manual (BNA) at 70:1052-55.

The discrepancy between the statute, the regulations, and the agency interpretations is due to Congress' failure to define the term "subterfuge" in Title IV of the ADA. The EEOC and the Justice Department, in certain writings, have expressed the view that, in order for a policy to not be a subterfuge, it must be based on sound actuarial principles. This definition is inconsistent with the Supreme Court's definition of the term subterfuge contained in the Age Discrimination in Employment Act. *See Ohio Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989). In *Betts*, the Court defined subterfuge as a specific intent to discriminate. *Id.* at 181.

We leave the resolution of the proper definition of subterfuge in Title IV for another day because we conclude that

the contents of a long-term disability plan offered by an employer because it is not a place of public accommodation.[8] We, therefore, disagree with the First Circuit's decision in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994). In *Carparts*, the health benefit plan offered by the employer contained a $25,000 cap on benefits for AIDS related illnesses while the plan provided $1,000,000 in coverage for any other illness. *Id.* at 14. The executors of the estate of an employee, who suffered from AIDS, brought suit against the provider of the self-funded medical reimbursement plan under the ADA alleging that the lifetime cap on health benefits for individuals with AIDS was discriminatory. *Id.* The court rejected the district court's conclusion that defendants were not liable under Title III because they were not places of public accommodation. *Id.* at 19. In rejecting the district court's construction, the court cited to the list of private entities considered public accommodations in § 12181(7) of Title III. The court particularly noted that the list includes a

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a long-term disability plan provided by an employer is not covered by Title III; the safe harbor provision is, therefore, not implicated.

[8] Judge Merritt's dissent contends that our conclusion flies in the face of Title IV of the ADA. In so contending, the dissent assumes that, by reaching our conclusion, we have held that insurance policies obtained through an employer are in no instance covered by the ADA. We have, rather, held only that a long-term disability plan obtained through an employer is not a public accommodation under Title III of the ADA. Because we do not have the issue before us, we express no opinion as to whether Title I covers employer-provided insurance policies thereby triggering application of Title IV.

" 'travel service,' a 'shoe repair service,' an 'office of an accountant, or lawyer,' an 'insurance office,' a 'professional office of a healthcare provider,' and 'other service establishment[s]' ". *Id.* (citing 42 U.S.C. § 12181(7)(F)). The plain meaning of those terms, the court concluded, "does not require 'public accommodations' to have physical structures for persons to enter." *Id.* The court further noted that "[b]y including 'travel service' among the list of services considered 'public accommodations,' Congress clearly contemplated that 'service establishments' include providers of services which do not require a person to physically enter an actual physical structure." *Id.* The court, therefore, concluded that a defendant who provides medical benefit plans could be[9] considered a public accommodation under Title III. *Id.*

In arriving at this conclusion, the First Circuit disregarded the statutory canon of construction, *noscitur a sociis*. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, ___, 115 S. Ct. 2407, 2415 (1995). The doctrine of *noscitur a sociis* instructs that "a . . . term is interpreted within the context of the accompanying words 'to avoid the giving of unintended breadth to the Acts of Congress.' " *Kurinsky v. United States*, 33 F.3d 594, 597 (6th Cir. 1994) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 1582, 6

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[9] The court did not hold that an organization providing medical benefit plans is a public accommodation; rather, the court remanded the case to the district court to "allow plaintiffs the opportunity to adduce further evidence supporting their view that the defendants are places of 'public accommodation' within the meaning of Title III of the ADA." *Carparts*, 37 F.3d at 19.

L.Ed.2d 859 (1961)), *cert. denied*, 514 U.S. 1082, 115 S. Ct. 1793, 131 L.Ed.2d 721 (1995); *see also Owen of Georgia, Inc. v. Shelby County*, 648 F.2d 1084, 1092 (6th Cir. 1981). Black's Law Dictionary defines the term as:

> It is known from its associates. The meaning of a word is or may be known for the accompanying words. Under the doctrine of "noscitur a sociis", the meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the meaning of other words or phrases associated with it.

BLACK'S LAW DICTIONARY 1060 (6th ed. 1990).

The clear connotation of the words in § 12181(7) is that a public accommodation is a physical place. Every term listed in § 12181(7) and subsection (F) is a physical place open to public access. The terms travel service, shoe repair service, office of an accountant or lawyer, insurance office, and professional office of a healthcare provider do not suggest otherwise. Rather than suggesting that Title III includes within its purview entities other than physical places, it is likely that Congress simply had no better term than "service" to describe an office where travel agents provide travel services and a place where shoes are repaired. Office of an accountant or lawyer, insurance office, and professional office of a healthcare provider, in the context of the other terms listed, suggest a physical place where services may be obtained and nothing more. To interpret these terms as permitting a place of accommodation to constitute something other than a physical place is to ignore the text of the statute and the principle of *noscitur a sociis*.

Accordingly, we conclude that the provision of a long-term disability plan by an employer and administered by an insurance company does not fall within the purview of Title III.[10]

B. Title I of the ADA Governs Employment Practices

Because the statutory framework of the ADA expressly limits discrimination in employment practices to Title I of the ADA, the District Court properly dismissed Schering-Plough, Parker's employer, from this action. As set out by the statute, Title I provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a). The regulations governing the ADA specifically provide that it is unlawful for an employer to discriminate on the basis of disability against a qualified individual with a disability in regard to "[f]ringe benefits available by virtue of employment, whether or not administered by the [employer]." 29 C.F.R. § 1630.4(f) (1996). As

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[10] We have not referred to legislative history in our discussion of this issue because, where the statutory meaning is clear, we do not resort to legislative history. *See United States v. Gonzales*, 117 S.Ct. 1032, 1035, 137 L.Ed.2d 132 (1997) (citing *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254, 112 S.Ct. 1046, 1049, 117 L.Ed.2d 391 (1992)).

noted by the Equal Employment Opportunity Commission ("EEOC"), the agency charged with administering and enforcing Title I of the ADA,[11] "[e]mployee benefit plans, including health insurance plans provided by an employer to its employees, are a fringe benefit available by virtue of employment. Generally speaking, therefore, the ADA prohibits employers from discriminating on the basis of disability in the provision of health insurance to their employees." EEOC: Interim Policy Guidance on ADA and Health Insurance, June 8, 1993, *reprinted in* Americans With Disabilities Act Manual (BNA) at 70:1051; *see also Hankins v. The Gap, Inc.*, 84 F.3d 797, 800 (6th Cir. 1996) ("Title I of the ADA . . . prohibits unwarranted discrimination against disabled persons in employment."); *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580, 583 (6th Cir.) ("Title I prohibits employment discrimination by a 'covered entity' "), *cert. denied*, ___ U.S. ___, 116 S. Ct. 674, 133 L.Ed.2d 523 (1995); *accord Equal Employment Opportunity Comm'n v. CNA Ins. Cos.*, 96 F.3d 1039 (7th Cir. 1996) (EEOC brought suit under Title I challenging a disability policy provided by an employer, CNA Insurance Co., which provided twenty-four months of coverage for mental disabilities versus coverage of physical disabilities until age 65); *Krauel v. Iowa Methodist Medical Ctr.*, 95 F.3d 674 (8th Cir. 1996) (alleged discrimination in self-funded health benefit plan provided by employer analyzed under Title I of the ADA); *Gonzales v. Garner Food Servs., Inc.*, 89 F.3d 1523 (11th Cir. 1996) (whether former employee had standing to sue for cap on AIDS related benefits in an employer provided health plan analyzed under Title I of the ADA),

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[11] *See* 42 U.S.C. § 12117.

cert. denied, ___ U.S. ___, 117 S. Ct. 1822, 137 L.Ed.2d 1030 (1997); *Motzkin v. Trustees of Boston Univ.*, 938 F. Supp. 983, 996 (D. Mass. 1996) (Title III did not apply to professor's employment discrimination claim against a university; "The legislative intent is so clear from the language of Titles I and III that one need not go beyond that language to conclude that employment discrimination is the exclusive province of Title I")[12].

It is, thus, clear that Schering-Plough is not a proper defendant under Title III, except to the extent that it is alleged to be a plan fiduciary; discrimination in the provision of fringe benefits during employment is governed strictly by Title I and the provision of a long-term disability plan is a fringe benefit of employment. *See, e.g., Equal Employment Opportunity Comm'n v. CNA Ins. Cos.*, 96 F.3d 1039, 1044 (7th Cir. 1996) ("One of th[e] terms, conditions, or privileges of employment may be a pension plan").

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[12] The court in *Motzkin* further found that:

> it would make no sense to construe Title III as including employment practices within its scope. Indeed, to do so might wreak havoc with the careful balance that Congress attempted to strike in Title I between the rights of employers and the rights of workers with disabilities. For example, the term "qualified individual with a disability" appears in Title I, but is absent from Title III. As a result, if Title III were construed to apply to employment practices, an employer would be within its rights under Title I, but might be liable under Title III, if it denied employment to an individual who, because of a disability, was incapable of performing the essential functions of the job.

Motzkin, 938 F. Supp. at 996 (citations omitted).

Because the provision of a long-term disability plan by an employer and administered by an insurance company does not fall within the purview of Title III and because the statutory framework of the ADA expressly limits discrimination in employment practices to Title I of the ADA, the District Court properly granted summary judgment on behalf of the defendants.

C. The ADA Prohibits Only Discrimination Between the Disabled and Non-Disabled

The disparity in benefits provided in the policy at issue is also not prohibited by the ADA because the ADA does not mandate equality between individuals with different disabilities. Rather, the ADA prohibits discrimination between the disabled and the non-disabled; specifically, the ADA mandates that the owners, lessors, and operators of public accommodations provide equal access to the disabled and non-disabled. Because all employees at Schering-Plough, whether disabled or not, received the same access to the long-term disability plan, neither the defendants nor the plan discriminated between the disabled and the able bodied.

In *Traynor v. Turnage*, 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988), the Supreme Court considered whether a benefit given to a certain class of disabled persons and not to others violated the Rehabilitation Act, 29 U.S.C. § 794.[13] At

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[13] The Rehabilitation Act, as amended, provides that:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the

issue in *Traynor* was the Veterans' Readjustment Benefit Act of 1966 ("GI Bill"), 38 U.S.C. § 1661, which affords educational assistance benefits to honorably discharged veterans. The benefits ordinarily must be used within ten years following the veteran's discharge; however, if the veteran was unable to utilize his or her benefits within the ten year period due to " 'a physical or mental disability which was not the result of [their] own willful misconduct,' " the veteran may obtain an extension. *Id.* at 538, 108 S.Ct. at 1376 (citing 38 U.S.C. § 1662(a)(1)). The petitioners in *Traynor* sought an extension because their alcoholism rendered them disabled during the ten year period following their discharge. *Id.* The Veterans' Administration denied the requested extensions because it concluded that their alcoholism constituted "willful misconduct." *Id.*

The petitioners' contention that the "willful misconduct" provision of the GI Bill violated the Rehabilitation Act was rejected by the Court. *Id.* at 548-49, 68 S.Ct. at 1382. In rejecting the petitioners' argument, the Court noted that the central purpose of the Rehabilitation Act is "to assure that

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> benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a). Over sixteen years after the Rehabilitation Act was enacted, Congress, concerned that the Rehabilitation Act alone was inadequate to eradicate discrimination against the disabled, signed into law the ADA, which has a broader scope than the Rehabilitation Act. *See Helen L. v. DiDario*, 46 F.3d 325, 331 (3d Cir.) (citing S. Rep. No. 116, 20; H.R. Rep. No. 485 (II), 50), ___ U.S. ___, *cert. denied*, 116 S. Ct. 64, 133 L.Ed.2d 26 (1995).

handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals." *Id.* at 548, 108 S.Ct. at 1382 (citations omitted). The Court clarified that "[t]his litigation does not involve a program or activity that is alleged to treat handicapped persons less favorably than nonhandicapped persons." *Id.* Rather, the "willful misconduct" provision "provides a special benefit to disabled veterans who bear no responsibility for their disabilities that is not provided to other disabled veterans or to any able-bodied veterans." *Id.* at 549, 108 S.Ct. at 1382. The benefits provided to a particular class did not violate the Act, in the Court's view, because "[t]here is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." *Id.* Thus, the Court held it is "not inconsistent with the Rehabilitation Act for only those veterans whose disabilities are not attributable to their own 'willful misconduct' to be granted extensions of the 10-year delimiting period applicable to all other veterans." *Id.; see also Alexander v. Choate,* 469 U.S. 287 (1985), 105 S.Ct. 712, 83 L.Ed.2d 661 (Tennessee's generalized limitations on Medicaid payments, which fell disproportionally on disabled individuals because of their greater medical needs, did not violate the Rehabilitation Act).

Following the Supreme Court's decision in *Traynor,* the United States Court of Appeals for the District of Columbia held in *Modderno v. King,* 82 F.3d 1059 (D.C. Cir. 1996), *cert. denied,* ___ U.S. ___, 117 S. Ct. 772, 136 L.Ed.2d 717 (1997), that the Foreign Service Benefit Plan provided to foreign service officers and their spouses, which limited lifetime coverage for mental health benefits to $75,000 while placing no similar restriction on benefits for physical illnesses, did

not violate the Rehabilitation Act. The D.C. Circuit found that, if across-the-board limits were permissible in *Alexander v. Choate*, then an insurance provider could cap the benefits for all illnesses. *Id.* at 1062. When an insurance provider, instead, places a limit on only one type of illness, such as mental illness, the disabled, as a class, benefit; if the cap were placed on all illnesses, the disabled as a class would be worse off, in the court's view. According to the court, "[i]f [the Rehabilitation Act] permits across-the-board limits on coverage, as *Alexander* holds, then it cannot forbid partial limits that leave some disabled individuals better off and the remainder no worse off." *Id.* (citing *Traynor v. Turnage*, 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988)). Accordingly, the court concluded that "distinctions between mental and physical care are no more vulnerable under § 504 [the Rehabilitation Act] than are completely generalized limits."[14] *Id.*; *see also Wolford v. Lewis*, 860 F. Supp. 1123, 1134 (S.D. W.Va. 1994) (the Rehabilitation Act "ensures only that disabled individuals receive the same treatment as those who are not disabled.")

Citing to *Alexander v. Choate* and the D.C. Circuit's decision in *Modderno*, the United States Court of Appeals for the Seventh Circuit in *Equal Employment Opportunity Commission v. CNA Insurance Cos.*, 96 F.3d 1039 (7th Cir. 1996), held that a limitation on mental health benefits in a long-term disability plan does not violate the ADA. In *CNA Insurance*, the defendant companies offered a long-

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[14] The court in *Modderno* also held that the cap on mental health benefits under the plan would not constitute a subterfuge under Title IV of the ADA which applies to the Rehabilitation Act. *Modderno*, 82 F.3d at 1063-65.

term disability policy to their employees in which benefits for mental illness were paid only for a two-year period while benefits for physical illnesses were paid until the employee reached age sixty-five. *Id.* at 1041. The EEOC brought suit against the defendants after an employee was informed by defendants that benefits for her mental disorder would be paid only for twenty-four months. In determining whether the former employee had standing to sue under the ADA for discrimination occurring during the employment period, the Seventh Circuit held that the employee suffered no discrimination under Title I of the ADA while she was employed. *Id.* at 1045. In the court's words:

> [a]ll employees – the perfectly healthy, the physically disabled, and the mentally disabled – had a plan that promised them long-term benefits from the onset of disability until age 65 if their problem was physical, and long-term benefits for two years if the problem was mental or nervous. This may or may not be an enlightened way to do things, but it was not discriminatory in the usual sense of the term.

Id. at 1044 (citing *Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985); *Modderno v. King*, 82 F.3d 1059 (D.C. Cir. 1996)). In determining whether the plan discriminates against employees who will sometime in the future become mentally disabled because they are unknowingly purchasing only twenty-four months of benefits, the court stated:

> However this is dressed up, it is really a claim that benefit plans themselves may not treat mental health conditions less favorably than they treat physical health conditions. Without far stronger

> language in the ADA supporting this result, we are loath to read into it a rule that has been the subject of vigorous, sometimes contentious, national debate for the last several years. Few, if any, mental health advocates have thought that the result they would like to see has been there all along in the ADA. This is well-illustrated by the debate over a proposed amendment to the Health Insurance Portability and Accountability Act of 1996. The amendment, which was defeated before final passage of the bill, would have required parity of coverage for mental and physical conditions. This debate reinforces our conclusion based on the language of the ADA that the issue of parity among physical and mental health benefits is one that is still in the legislative arena.

Id. (citations omitted).

On September 26, 1996, the day before the Seventh Circuit's decision in *CNA Insurance* was released, Congress enacted the Mental Health Parity Act, 42 U.S.C. § 300gg-5, as an amendment to the Health Insurance Portability Act.[15] *See* 42 U.S.C. § 300gg. The Mental Health Parity Act mandates, *inter alia*, that where a health insurance plan contains no lifetime limit or annual limit for medical or surgical benefits, the plan may not contain a lifetime or annual limit for mental health benefits. *See* 42 U.S.C. § 300gg-5(1)-(2). Similarly, if the health insurance policy includes an annual or lifetime limit on medical or surgical benefits, the plan must apply the same limits to mental health benefits. *Id.* As several of the amici curiae argue, Congress' passage of the Mental Health

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[15] The Mental Health Parity Act was also enacted subsequent to the panel's decision in *Parker*.

Parity Act suggests Congress believed that the ADA neither governs the content of insurance policies nor requires parity between physical and mental illnesses; thus, passage of a law requiring such parity was required if Congress desired insurance carriers to cease including disparate mental and physical health benefits in insurance policies. Particularly pertinent to the instant case, however, the Health Insurance Portability Act specifically exempts from its coverage "disability income insurance." 42 U.S.C. § 300gg-91(c)(1)(A). While Congress likely realized that equality between the two types of disabilities was not covered by the ADA, it sought to remedy the absence only in the context of health insurance coverage, not long-term disability policies. Thus, it appears that Congress did not believe the necessity for parity between mental and physical disabilities in long-term disability plans was sufficiently compelling to include them within the purview of the Act.[16]

Without discussing the Mental Health Parity Act,[17] the United States Court of Appeals for the Eighth Circuit in *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674 (8th Cir. 1996), held that the ADA prohibits only discrimination between the disabled and non-disabled. In *Krauel*, an employee brought suit under the ADA against her

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[16] The converse cannot be argued: Congress did not need to include long-term disability plans in the Mental Health Parity Act because the ADA required parity in such plans. It simply cannot be the case that the ADA would cover long-term disability plans but not group health insurance plans.

[17] The Mental Health Parity Act was enacted two weeks after the opinion in *Krauel* was released.

employer alleging that the exclusion of infertility treatments from her employee medical benefits plan constituted discrimination because the exclusion was a disability based distinction. The Eighth Circuit, citing to EEOC guidelines interpreting the ADA, held that "[i]nsurance distinctions that apply equally to all insured employees, that is, to individuals with disabilities and to those who are not disabled, do not discriminate on the basis of disability." *Id.* at 678. The court specifically cited to the language of the following EEOC guideline for support:

> . . . a feature of some employer provided health insurance plans is a distinction between the benefits provided for the treatment of physical conditions on the one hand, and the benefits provided for the treatment of "mental/nervous" conditions on the other. Typically, a lower level of benefits is provided for the treatment of mental/nervous conditions than is provided for the treatment of physical conditions. Similarly, some health insurance plans provide fewer benefits for "eye care" than for other physical conditions. Such broad distinctions which apply to the treatment of a multitude of dissimilar conditions and which constrain individuals both with and without disabilities, are not distinctions based on disability. Consequently, although such distinctions may have a greater impact on certain individuals with disabilities, they do no intentionally discriminate on the basis of disability and do not violate the ADA.

Id. (quoting EEOC: Interim Enforcement Guidance on Application of ADA to Health Insurance, (June 8, 1993), *reprinted in* Fair. Empl. Prac. Man. 405:7115, 7118(BNA)). In accordance with these guidelines, the court concluded

that the plan's exclusion of benefits for infertility treatments did not single out a particular group of disabilities. "Rather, the Plan's infertility exclusion applies equally to all individuals, in that no one participating in the Plan receives coverage for treatment of infertility problems." *Id.* at 678. Thus, the court held, the plan did not contain a disability-based distinction. *Id.; see also Cramer v. State of Florida,* 885 F. Supp. 1545, 1550-1553 (M.D. Fla. 1995) (citing *Alexander v. Choate* and *Traynor v. Turnage,* the court held that "the ADA applies only to discrimination against disabled persons compared to non-disabled persons"; it does "not ensure 'evenhanded treatment' as compared to other disabled persons."); *Williams v. Secretary of the Executive Office of Human Servs.*, 441 Mass. 551, 609 N.E.2d 447, 454 (1993) ("The focus of Federal disability discrimination statutes is to address discrimination in relation to nondisabled persons, rather than to eliminate all differences in levels or proportions of resources allocated and services provided to individuals with differing types of disabilities.").

In conclusion, we agree with those circuits that have extended the Supreme Court's holdings in *Traynor v. Turnage* and *Alexander v. Choate* to the ADA. As the Court concluded regarding the Rehabilitation Act, the ADA similarly does not prohibit an insurance company from differentiating between different disabilities. The same policy is provided to all employees who, when they receive it, are not disabled but working. The fact that some may become disabled for different reasons does not amount to discrimination in providing the policy. The ADA simply does not mandate equality between individuals with different disabilities. Rather, the ADA, like the

Rehabilitation Act, prohibits discrimination between the disabled and the non-disabled.

IV.

For the foregoing reasons, the judgment of the District Court is **AFFIRMED.**

DISSENT

BOYCE F. MARTIN, JR., Chief Judge, dissenting. I join Judge Merritt and others in dissenting from the opinion of the Court in this case. I write separately to highlight my agreement with Judge Merritt regarding congressional intent and to emphasize my disagreement with the majority's interpretation of *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580 (6th Cir. 1995).

In *Stoutenborough*, a hearing impaired individual and an association of hearing impaired individuals sought to prohibit the National Football League, its member clubs, and several broadcast companies from using the so-called "blackout rule" to avoid broadcasting live local football games when tickets to the live game had not been completely sold seventy-two hours before the game. With regard to Stoutenborough's Title III claim, we stated that "plaintiff's argument that the prohibitions of Title III are not solely limited to 'places' of public accommodation contravenes the plain language of the statute." *Id.* at 583.

The majority takes this language to mean that Title III's mandates are limited to physical structures. However, *Stoutenborough* recognized that, in the context of a Title III claim, the term "place" is a defined term; we recognized that "a 'place' is '[1] a facility, [2] operated by a private entity, [3] whose operations affect commerce and [4] fall within at least one of the twelve "public accommodation" categories.' " *Id.* Because the defendants in *Stoutenborough,* did not fall within one of the twelve public accommodation categories, they were not "places" of public accommodation as required for Title III protection. Thus, although *Stoutenborough* limited Title III's applicability to "places," it did so in the context of the defined meaning of the term "place." Unlike the defendants in *Stoutenborough,* Title III specifically identifies an "insurance office" as a public accommodation. 42 U.S.C. § 12181(7)(F).

Not only does the majority view incorrectly apply *Stoutenborough,* it also directly conflicts with the conclusion reached by the First Circuit. In *Carparts Distri. Ctr. v. Automotive Wholesalers Ass'n of New England,* 37 F.3d 12 (1st Cir. 1994), the First Circuit held that, by including travel services in the list of public accommodations, Congress chose not to limit Title III protections to physical structures. The *Carparts* court wrote: "It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result." *Id.* at 19. Similarly, Judge Merritt notes that, under the majority view, individuals who purchase insurance through an insurance office are entitled to Title

III protections while those who purchase insurance through their employers receive no Title III protections.

In my view, Judge Merritt and the First Circuit present a more compelling argument. As the First Circuit noted, "[t]he purpose of Title III is 'to bring individuals with disabilities into the economic and social mainstream of American life. . . . in a clear, balanced, and reasonable manner.' " *Id.* (citing H.R.Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 99 (1990) *reprinted in* 1990 U.S.C.C.A.N. 303, 382).

By limiting Title III's applicability to physical structures, the majority interprets Title III in a manner completely at odds with clear congressional intent. In recent years, the economic and social mainstream of American life has experienced significant change due to technological advances. An increasing array of products and services are becoming available for purchase by telephone order, through the mail, via the Internet, and other communications media. Unfortunately, under the majority view, the same technological advances that have offered disabled individuals unprecedented freedom may now operate to deprive them of rights that Title III would otherwise guarantee. As the modern economy increases the percentage of goods and services available through a marketplace that does not consist of physical structures, the protections of Title III will become increasingly diluted.

In my view, the majority view incorrectly applies a prior opinion of this Court and reaches a conclusion clearly at odds with congressional intent. Accordingly, I join Judge Merritt and respectfully dissent.

DISSENT

MERRITT, Circuit Judge, dissenting. I would adhere to the panel's interpretation with respect to the application to group health and disability insurance policies of Titles III and IV of the Americans with Disabilities Act, 42 U.S.C. §§ 12182, 12201. The panel's reasoning is fully set out in its published decision, *Parker v. Metropolitan Life Ins. Co.*, 99 F.3d 181 (6th Cir. 1996). It reaches the conclusion that the statute covers group health and disability insurance provided by insurance companies through an insured's employer, as well as insurance provided by walk-in insurance agencies.

Our Court has now held that the provisions of the Disabilities Act simply do not cover employee health and disability insurance plans because "a benefit plan offered by an employer is not a good offered by a place of public accommodation" (Op. p. ___). Footnotes 4 and 9 of the Court's opinion notwithstanding, according to the express language of the Court's opinion, Parker is not covered because she got her coverage from MetLife through the employer instead of walking into a MetLife office and buying it.

> [T]he good that plaintiff seeks is not offered by a place of public accommodation. The public cannot enter the office of MetLife or Schering-Plough and obtain the long-term disability policy that plaintiff obtained. Parker did not access her policy from MetLife's insurance office.

> Rather, she obtained her benefits through her employer.

(Op. p. 10, ¶ 2.) Footnotes 4 and 9 are *post hoc* efforts by the Court to do an about face and march off in a different direction, or at least bury its head in the sand.

Our Court's decision that the Disabilities Act does not cover employer-sponsored plans flies in the face of § 501(c) of the Act, 42 U.S.C. § 12201(e), entitled "Insurance" (attached as an addendum to this opinion), which immediately follows the Title III coverage provision prohibiting discrimination. It provides a "safe harbor" for insurance companies in certain respects. If Title III does not cover the millions of employees covered by health and disability insurance policies, as our Court has now held, it is difficult to see why Congress would provide a qualified exemption for insurance companies. It is also difficult to see why the House and Senate Committee Reports would treat such insurance as covered by the Act, as the following quotes clearly demonstrate:

> Under the [Disabilities Act], a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not impose increased risks.
>
> . . . .
>
> Moreover, while a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section [codified at 42 U.S.C. § 12201(c)], the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate

> for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.
>
> For example, a blind person may not be denied coverage based on blindness independent of actuarial risk classification.

H.R.Rep. No. 485, 101st Cong., 2nd Sess., pt. II, at 136-37 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 303, 419-20. The explanation continues:

> In sum, section 501(c) [the safe-harbor provision] is intended to afford to insurers and employers the same opportunities they would enjoy in the absence of the legislation to design and administer insurance products and benefit plans in a manner that is consistent with basic principles of insurance risk classification. This legislation assures that decisions concerning the insurance of persons with disabilities which are not based on bona fide risk classification be made in conformity with non-discrimination requirements. Without such clarification, this legislation could arguably find violative of its provisions any action taken by an insurer or employer which treats disabled persons differently under an insurance or benefit plan because they represent an increased hazard of death or illness.
>
> . . . .

Id. at 137-38, reprinted in 1990 U.S.C.C.A.N. at 420-21. Another House report states:

> [Section 12201] specifies that titles I, II, and III shall not be construed to restrict various

> insurance practices on the part of insurance companies and employers, as long as such practices are not used to evade the purposes of this Act.
>
> . . . .
>
> Specifically, [Section 12201(c)(1)] makes it clear that insurers may continue to sell to and underwrite individuals applying for life, health, or other insurance on an individually underwritten basis, or to service such products, so long as the standards used are based on sound actuarial data and not on speculation.
>
> . . . .
>
> In sum, [the Disabilities Act] requires that underwriting and classification of risks be based on sound actuarial principles or be related to actual or reasonably anticipated experience.

H.R.Rep. No. 485, 101st Cong., 2nd Sess. pt. III, at 70 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 493. The Senate report contains an explanation nearly identical to those quoted above. *See* S. Rep. No. 116, 101st Cong., 1st Sess. 84-86 (1989). In addition, the Senate Report states:

> The Committee does not intend that any provisions of this legislation should affect the way the insurance industry does business in accordance with the State laws and regulations under which it is regulated. Virtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life. The [Disabilities Act] adopts this prohibition of discrimination. Under the [Disabilities Act], a person with a disability cannot be denied insurance or be subject to different terms or conditions of

> insurance based on disability alone, if the disability does not pose increased risks. *Id.* at 84.

It is strange, indeed, that Congress would put § 501(c) in the Act and write these committee reports if Congress did not include employer-sponsored health and disability insurance in the prohibition against discrimination based on disability. It boggles the mind to think that Congress would include only the few people who walk into an insurance office to buy health insurance but not the millions who get such insurance at work. This distinction drawn by the Court produces an absurd result.

The Court limits § 12182(a) "to physical access to an office," rejecting the contrary view of the other circuit and district courts that have decided the issue, as well rejecting the Department of Justice and the EEOC view that employer group health insurance is covered. In the end, the unnecessary conflict between these two views will now have to be resolved by the Supreme Court.

The fact that Congress intended that health and disability insurance for employees is covered by Titles III and IV does not necessarily mean that insurance companies lose. It means merely, as noted in the panel decision, that insurance practices, including the insurance industry's justification for its distinction between mental and physical disabilities, are fully protected to the extent they are in accord with sound actuarial principles, reasonably anticipated experience and bona fide risk classification. The case, as the panel held, should be remanded to the district court for further consideration of the factual and legal issues arising under Title IV from the

insurance industry's asserted distinction between mental and physical disabilities.

ADDENDUM

(c) Insurance

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict –

> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (2) a person or organization covered by the chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on understanding risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.

No. 95-5269

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OUIDA SUE PARKER, *Plaintiff-Appellant,* *v.* METROPOLITAN LIFE INSURANCE COMPANY, SCHERING-PLOUGH CORPORATION, and SCHERING-PLOUGH HEALTH CARE PRODUCTS, INC., *Defendants-Appellees.*	)	ON APPEAL from the United States District Court for the Western District of Tennessee

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Decided and Filed October 25, 1996

Before: MERRITT and MILBURN, Circuit Judges; O'MALLEY, District Judge.*

MERRITT, Circuit Judge. Plaintiff filed this action against her employer, Schering-Plough, and her employer's insurance company, Metropolitan Life, under the Americans with Disabilities Act ("Disabilities Act" or "the Act"), 42 U.S.C. §§ 12101-12213, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.

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* The Honorable Kathleen M. O'Malley, United States District Judge for the Northern District of Ohio, sitting by designation.

§§ 1001-1461. After working for Schering for nine years, the Plaintiff became totally disabled due to "severe depression." Under the long term disability plan offered through her employer, she was given benefits for twenty-four months. Because her disability was deemed to be caused by a "nervous/mental" disorder, her benefits were then cut off. Had her disability been due to physical problems, she would have continued to receive benefits until the age of 65.

The District Court found that the Plaintiff did not have standing to sue under Title I of the Disabilities Act because she is not a "qualified individual with a disability," due to the fact that she can no longer perform the essential functions of her job. The District Court also held that the Plaintiff does not have standing to sue under Title III of the Disabilities Act because she was not denied physical access to goods or services. And finally, the District Court granted Defendants' motion for summary judgment on Plaintiff's ERISA claim because it found that Defendants' classification of Plaintiff's disorder as "nervous/mental," rather than physical, was not arbitrary and capricious. We AFFIRM the decisions of the District Court with respect to Plaintiff's ERISA and Title I claims.

The decision of the District Court with respect to Plaintiff's Title III claim, however, must be REVERSED. The statutory language of the Disabilities Act is sufficiently broad to prohibit discrimination in the contents of insurance products, not just physical access to insurance company offices. In addition, the legislative history of the Act, agency interpretation, and interpreting case law all support the conclusion that the Disabilities Act prohibits discrimination in the contents of insurance products.

Thus, the Plaintiff has standing to bring her Title III claim. Plaintiff must still prove, however, that the specific differentiation engaged in here, where those with nervous/mental disorders are treated differently from those with physical disorders in the provision of long term disability benefits, is, as a substantive matter, discriminatory under the Disabilities Act. We therefore REMAND this case for further proceedings consistent with this opinion.

I. Facts and Procedural History

Ouida Sue Parker worked for Schering-Plough from 1981 until 1990. During that time, she chose to participate in Schering's Long Term Disability plan, which was administered through Metropolitan Life Insurance Company. According to her complaint, on October 29, 1990, she became totally disabled due to "chronic severe major depression of a physical origin."

Ms. Parker began receiving benefits on April 29, 1993, after the twenty-six week waiting period expired. Under the MetLife Disability Plan, persons who are deemed to be totally disabled due to a mental or nervous disorder can receive benefits for up to twenty-four months. (Persons "fully disabled" under the plan are those who, because of sickness or injury, cannot do their job.) At the end of the twenty-four months, benefits continue only if the person is confined to a hospital or qualified institution. In contrast, persons considered totally disabled due to physical disorders receive benefits until the age of sixty-five.

During the period in which Ms. Parker was receiving disability benefits, her doctor sent MetLife reports indicating that she remained totally disabled primarily due to "major depression" and secondarily due to "generalized anxiety disorder." MetLife wrote to her on April 15, 1993, indicating that benefits would terminate on the 29th of that month. Ms. Parker appealed the decision, arguing that her disability could not be considered completely mental and nervous. MetLife denied the appeal, stating that major depression falls under the mental/nervous disorder provision. In May, 1993, Ms. Parker's doctor again wrote to MetLife, stating that the major depression she suffered was "a chemical disorder of a deepseated nature." MetLife had one of its consulting psychiatrists review the file. He concluded that:

> Irrespective of any chemical factors in its etiology, major depression is a DSM III R diagnosis; Ms. Parker is being treated by a psychiatrist with psychoactive medication. In my opinion, her major depression should be reimbursed under the nervous/mental illness clause of her contract.

MetLife again upheld the termination of her benefits.

Ms. Parker then filed this action, alleging violations of Titles I and III of the Americans with Disabilities Act and a violation of the Employee Retirement Income Security Act. The District Court granted Defendants' motions for summary judgment. First, it found that Ms. Parker did not have standing to sue under Title I of the Disabilities Act, because the statute provides relief only to "qualified individuals with a disability" and, at the time her benefits

were terminated, Ms. Parker was not a "qualified individual with a disability" because her disorder prevented her from "performing the essential functions of her job." The District Court also dismissed Ms. Parker's claim against MetLife under Title III of the Disabilities Act because it found that the statute does not cover discrimination in insurance policies; it covers only physical access to goods and services. The District Court dismissed Plaintiff's Title III claim against Schering for the additional reason that the Disabilities Act explicitly states that Title I governs employment practices, not Title III. Finally, the District Court granted summary judgment in favor of the Defendants on Plaintiff's ERISA claim. It held that the appropriate standard of review of a plan administrator or fiduciary's interpretation of an insurance plan provision is the "arbitrary and capricious" standard, and, in this case, Plaintiff failed to raise sufficient evidence that the classification of her disorder as "nervous/mental" was arbitrary and capricious.

II. ERISA Claim

The District Court granted Defendants' motion for summary judgment on Plaintiff's ERISA claim. Plaintiff claims that the MetLife/Schering decision to classify Ms. Parker's disability as "nervous/mental" should be reviewed *de novo*. Plaintiff then argues that under such a standard, summary judgment is inappropriate because there is a genuine issue of material fact regarding the cause of Plaintiff's disability. As the District Court noted, however, the Supreme Court has held that "a denial of benefits challenged under [ERISA] is to be reviewed under a *de novo* standard unless the benefit plan gives the

administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 956-57, 103 L.Ed.2d 80 (1989). In this case, the plan contains a detailed and explicit provision granting Defendants the authority to do just that.

In 1991, in *Miller v. Metropolitan Life Insurance Co.*, this Court held that where such discretion exists, an ERISA benefit plan administrator's decisions on eligibility for benefits are not arbitrary and capricious if they are "rational in light of the plan's provisions." 925 F.2d 979, 984 (6th Cir. 1991) (citing *Daniel v. Eaton Corp.*, 839 F.2d 263, 267 (6th Cir.), *cert. denied*, 488 U.S. 826, 109 S.Ct. 76, 102 L.Ed.2d 52 (1988)). The decision to terminate Ms. Parker's benefits based on the categorization of her disability as "nervous/mental" clearly meets that standard. Ms. Parker's doctor told MetLife that she was suffering primarily from "major depression" and secondarily from a "generalized anxiety disorder." Ms. Parker then wrote to MetLife, stating that her disability could not be considered "completely" mental and nervous. While it is true that Ms. Parker's doctor then wrote to MetLife, stating that the major depression she suffered was "a chemical disorder of a deepseated nature," MetLife's consulting psychiatrist reviewed the file and concluded that:

> Irrespective of any chemical factors in its etiology, major depression is a DSM III R diagnosis; Ms. Parker is being treated by a psychiatrist with psychoactive medication. In my opinion, her major depression should be reimbursed under the nervous/mental illness clause of her contract.

Thus, MetLife's decision to classify Plaintiff's illness as mental appears rational, not arbitrary. If the standard of review were *de novo*, perhaps there would be a genuine issue of material fact as to whether chemical imbalances which lead to depression are "physical" or "mental" disorders. The standard of review being what it is, there is no genuine issue. The District Court properly granted summary judgment on Plaintiff's ERISA claims.

Plaintiff argues, alternatively, that because Defendants stand to gain financially from their present interpretation of the plan, this conflict of interest mandates a higher standard of review. The case law does not support this contention. Even while acknowledging that conflicts must be taken into account, courts have upheld the arbitrary and capricious standard. *Firestone*, 489 U.S. at 115, 109 S.Ct. at 956-57; *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985). In *Firestone*, the Supreme Court also stated that, "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conduct must be weighed as a 'factor in determining whether there is an abuse of discretion.' " 489 U.S. at 115, 109 S.Ct. at 957 (citing Restatement (Second) of Trusts § 187 cmt. d (1959)). In *Jung*, the Ninth Circuit held that, "[w]here, as here, the employer's denial of benefits to a class avoids a very substantial outlay, the reviewing court should consider that fact in applying the arbitrary and capricious standard of review. Less deference should be given to the trustee's decision." 755 F.2d at 712. Thus, even if this Court found a conflict, it would merely be a factor to be taken into account. The standard of review would be the same: arbitrary and capricious. And even assuming, for the sake of argument, that such a

conflict exists, Defendants' decision would still not be arbitrary or capricious.

III. Title I Claim

The District Court held that Ms. Parker did not have "standing" to sue under Title I of the Disabilities Act (the title that governs employment practices) because she is not a "qualified individual with a disability." Section 12112(a) of the Americans with Disabilities Act provides that "[n]o covered entity shall discriminate against a *qualified individual with a disability* because of the disability of such individual in regard to . . . terms, conditions, and privileges of employment" (emphasis added). Disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual. . . . " 42 U.S.C. § 12102(2)(A). A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

Under the District Court's interpretation of the plain meaning of that statute, Ms. Parker was at no time a "qualified individual with a disability." At the time she could "perform the essential functions" of her job, she was not disabled for purposes of her long term disability claim, and therefore was not covered by the Disabilities Act, and at the time her insurance benefits were terminated, she could no longer perform her job.

In *Beauford v. Father Flanagan's Boys' Home*, a Rehabilitation Act case, the Eighth Circuit held that employees

who are no longer able to do their job are not "otherwise qualified handicapped individuals" covered by the Act. 831 F.2d 768, 771 (8th Cir. 1987), *cert. denied*, 485 U.S. 938, 108 S.Ct. 1116, 99 L.Ed.2d 277 (1988). The court concluded that, "[d]iscrimination in the handling of salary continuation and health and dental benefits due handicapped employees unable to perform the essential functions of their jobs is an undesirable thing. However, in the end, protection from such discrimination is simply not contemplated under Section 504 of the Rehabilitation Act." *Id.* at 773. The Disabilities Act provides that "agencies with enforcement authority . . . under this subchapter and under the Rehabilitation Act of 1973 shall develop procedures to ensure that administrative complaints filed under [these Acts] are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements. . . . " 42 U.S.C. § 12117(b) ("Coordination"). Thus, the District Court held in this case that Rehabilitation Act cases interpreting the definition of "qualified" should govern in the Disabilities Act context as well. The court also cited the legislative history of the Disabilities Act as support for its conclusion. The legislative history, according to the court below, indicates that the main purpose of Title I was to ensure that disabled persons could obtain and keep employment, and therefore, it was not intended to provide relief for Ms. Parker.

The Equal Employment Opportunity Commission in its amicus brief asserts that *Beauford* was wrongly decided and should therefore not be followed. Plaintiff and the

EEOC also provide an alternate interpretation of the statutory language under which Plaintiff is a "qualified individual with a disability." The EEOC explains in its brief that the Disabilities Act explicitly prohibits discrimination in fringe benefits, citing 42 U.S.C. § 12112(b)(2). It argues that because "most long-term disability benefits are reserved for those who are unable to hold any substantial employment for which they are qualified," under the court's interpretation of the term qualified, "virtually no employee could ever challenge discrimination in the provision of long-term disability benefits." EEOC Br. 11 (citing Fred K. Foulkes, *Employee Benefits Handbook* 18-2 (1982)). The EEOC concludes that "[t]he fact that this approach would bar most employees from challenging discrimination in the provision of long-term disability benefits strongly suggests that it is incorrect," because the Disabilities Act's express prohibition against discrimination in fringe benefits would be significantly undermined. The circularity of this reasoning is apparent.

The EEOC states at page twelve of its brief that, "To be covered under Title I of the statute, an employee need only be able to 'perform the essential functions of the employment position that such individual holds or desires.' " (quoting 42 U.S.C. § 12111(8)). It then suggests that Ms. Parker is not seeking to invoke the statute to allow her to obtain or retain what one would ordinarily think of as an "employment position." Both sides agree that she cannot continue to work at all. Thus, the Plaintiff and EEOC suggest that she is invoking the statute in an effort to retain the "employment position" of "benefit recipient." The term does not appear anywhere in the statute itself. The concept of an employment position

entitled "benefits recipient" appears to be creative thinking on the part of Plaintiff and the EEOC. They argue that the Plaintiff is qualified to hold this position because she has satisfied all the non-discriminatory eligibility criteria by working for Schering, becoming a participant in the LTD plan, and paying her premiums as required.

Plaintiff's proposed construction of the statute is not persuasive. The concept of "benefits recipient" as an "employment position" relies on a convoluted construction of the statutory language, which conflicts with the plain meaning of the words. Perhaps the drafters of the statute intended that Ms. Parker's situation bring her within the coverage of the Disabilities Act. If that is the case, they failed to provide definitions that lend themselves to doing so. Unfortunately, Congress may not have taken this situation into account. Such an oversight, however, is for Congress to remedy. We should not try to rewrite the statute in a way that conflicts with what appears to be fairly clear language.

Plaintiff and amici are unable to cite any case law to support their construction of the statute explicitly, although they do cite two cases in which totally disabled persons were permitted to sue their employers under the Disabilities Act. *Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994) (AIDS patient had standing to sue under Disabilities Act where insurance benefits for AIDS related illnesses were more limited than benefits for other illnesses); *Schroeder v. Connecticut Gen. Life Ins. Co.*, No. 93-M-2433 (D. Colo. April 22, 1994) (Plaintiff stated a claim under Disabilities Act where LTD benefits were terminated after 30 months on grounds that disability was

"mental"). The issue of standing was not raised, however, in either of these two cases. In contrast, the United States Court of Appeals for the Eleventh Circuit, in *Gonzales v. Garner Food Services, Inc.*, rejected the line of reasoning suggested by the Plaintiff in this case. The *Gonzales* court held that a former Garner employee who was a participant in Garner's health benefit plan by virtue of his former employment was not a "qualified individual with a disability" within the meaning of the Disabilities Act. 89 F.3d 1523 (11th Cir. 1996); *see also McNemar v. The Disney Store, Inc.*, 91 F.3d 610 (3d Cir. 1996); *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996); *Equal Employment Opportunity Comm'n v. CNA Ins. Cos.*, 1996 WL 26879 (N.D. Ill. Jan. 23, 1996); *Esfahani v. Medical College of Penn.*, 919 F. Supp. 832 (E.D. Pa. 1996).

IV. Title III and IV Claims

Unlike Title I of the Disabilities Act, which governs employment practices, Title III governs "Public Accommodations and Services Operated by Private Entities." The issue presented by this case is whether it violates Title III of the Disabilities Act for an employer and its insurer to provide inferior health care benefits for employees with mental illness as compared to the benefits given to employees with physical illness. A threshold question exists, however, as to whether the Disabilities Act prohibits discrimination in the contents of the goods and services offered at places of public accommodation, rather than just discrimination in terms of physical access to places of public accommodation. We find that the Disabilities Act does reach the contents of goods and

services,[1] and must therefore address the subsequent issue of whether insurance products are exempted from the effects of Title III by the "safe harbor" provisions of Title IV.

A. The Meaning of the "Public Accommodation" Provision

Title III of the Disabilities Act provides that, as a "General Rule":

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). Section 12182 also includes more detailed prohibitions, such as those against the provision of unequal or separate benefits:

> (b) Construction
>
> (1) General prohibition

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[1] Part of the confusion that exists in this case stems from Congress' use of the term "public accommodation." This term harks back to the public accommodations language in the Civil Rights Act of 1964 and other early civil rights legislation, statutes designed to afford all persons with physical access to private establishments. Conceptually, the idea of access to places of public accommodation is very different from the idea of discrimination in the content of goods and services. Yet, rather than clearly stating its intention to write a broader reaching statute, the drafters have simply grafted "goods and services" language onto "public accommodation" terminology.

> (A) Activities
>
> (ii) Participation in unequal benefit
>
> It shall be discriminatory to afford an individual . . . on the basis of a disability . . . with the opportunity to participate in or benefit from a good . . . that is not equal to that afforded to other individuals.
>
> (iii) Separate benefit
>
> It shall be discriminatory to provide an individual . . . on the basis of a disability . . . with a good . . . that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

42 U.S.C. §§ 12182(b)(1)(A)(ii)-(iii). Plaintiff argues that the plain language of these provisions covers "insurance products," because insurance products are "goods" or "services" provided by a "person" who owns a "public accommodation." We agree.

Statutory language must be given its common and ordinary meaning. *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585, 590-91, 7 L.Ed.2d 492 (1962). Bearing in mind this important principle, we find that Title III of the Disabilities Act prohibits discrimination on the basis of disability in the

contents of insurance products. Insurance products clearly fall within the common and ordinary meaning of the term "goods," and the provision of insurance coverage clearly falls within the common and ordinary meaning of the term "service." In addition, the statute specifically includes "insurance office" within the definition "public accommodation" if the entity's operations affect commerce. 42 U.S.C. § 12181(7)(F). The Plaintiff's condition qualifies as a "disability," which is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). Furthermore, because she suffers from a "nervous/mental" (rather than a physical) disability, the Plaintiff is receiving a "good" or "service" that is "different . . . from that provided to other individuals." Thus, the Plaintiff appears to meet the statutory criteria for establishing a claim under Title III of the Disabilities Act.[2]

In addition to ascribing to words their common and ordinary meaning, we also note that we are bound to interpret statutory language in such a way as to avoid rendering terms superfluous. *Burns v. United States*, 501 U.S. 129, 145, 111 S.Ct. 2182, 2191, 115 L.Ed.2d 123 (1991). Defendants' suggested statutory interpretation would do just that. To say that the Disabilities Act prohibits discrimination only as to "physical access" to places of "public accommodation" would write the terms "goods" and "services" out of the

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[2] Although the "safe harbor" provisions of Title IV (which we address later in this opinion) serve to limit ADA liability significantly in the insurance context, the safe harbor provisions do not entirely nullify the broad reach of the Title III prohibitions against discrimination and their apparent applicability to insurance products.

statute. In addition, we note that, even if the language were not so clear, remedial statutes are to be interpreted broadly, in a manner consistent with their stated goal. *Gomez v. Toledo*, 446 U.S. 635, 639, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980). The Disabilities Act was intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The meaning we ascribe to the provisions today is much more in keeping with this broad goal than the constricted interpretation suggested by Defendants.

Numerous cases have interpreted the statute as we do today. For example, in *Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.* (a case the District Court in this case declined to follow without discussion), the First Circuit held that "public accommodation" within the meaning of Title III of the Disabilities Act is not limited to actual physical structures, and thus, the act may apply to a limitation of lifetime health benefits for AIDS related illnesses. 37 F.3d 12 (1st Cir. 1994). The *Carparts* court relied primarily, as we do, on the plain language of the statute and concluded that to "limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the [Disabilities Act] and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public." *Id.* at 20.

Similarly, District Courts in the Third, Ninth and Eleventh Circuits have concurred with this reasoning. In *Sharrow v. Bailey*, the United States District Court for the Middle District of Pennsylvania held that an HIV-positive

patient whose surgery was delayed by one day when his doctor requested protective suits, even though they were not necessary under Center for Disease Control standards, had standing to sue under Title III of the Disabilities Act. 910 F. Supp. 187 (M.D. Pa. 1995). The District Court held that in order to establish a violation of § 12182(a), "a plaintiff must prove that he or she: 1) has a disability; 2) was discriminated against on the basis of that disability; 3) was thereby denied goods or services; 4) by a place of public accommodation by the owner or operator of that facility." *Id.* at 191. In *Kotev v. First Colony Life Insurance Co.*, the United States District Court for the Central District of California held that a woman who was denied life insurance based on her spouse's HIV-positive status could bring an action under Title III of the Disabilities Act. 927 F. Supp. 1316 (C.D. Cal. 1996). That court concluded that "Congress intended to reach insurance practices by prohibiting differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified." *Id.* at 1322-23. And finally, in *Baker v. Hartford Life Insurance Co.*, the United States District Court for the Northern District of Illinois held that an insurance company may be held liable under Title III of the Disabilities Act based on a denial of coverage. 1995 WL 573430 (N.D. Ill. Sept. 28, 1995).[3]

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[3] According to the EEOC, there is a pending case, *Leonard F. v. Israel Discount Bank*, No. 95-6420 (2d Cir.), which involves the applicability of the ADA to discrimination in the provision of long-term disability benefits, but the order is unpublished and is not available through the electronic database services. It has been appealed, but the Second Circuit has not yet ruled.

In this case, the District Court chose to follow another District Court of this Circuit, which had held that a woman who sued her employer and her insurer when she was turned down for family health insurance because of her husband's hypertension and because her son was a paraplegic had no standing, due to the fact that the Disabilities Act prohibits discrimination in terms of physical access to places of public accommodation, not to the goods and services sold there. *Pappas v. Bethesda Hosp. Ass'n*, 861 F. Supp. 616 (S.D. Ohio 1994). In *Pappas*, the District Court reasoned that the plain language of Title III requires a "nexus" between the "public accommodation" and the alleged discrimination, which was not present in the case. *Id.* at 620. Thus, the court concluded that "the scope of Title III is limited to discrimination in the provisions of goods, services . . . or accommodations based on a disabled person's physical ability to make use of those goods, services, etc." *Id.* We disagree with this narrow interpretation of the Disabilities Act's provisions. We agree, instead, with the First Circuit's view that:

> Many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity to purchase the goods or services. To exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the [Disabilities Act] and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services,

> privileges and advantages, available indiscriminately to other members of the general public.

Carparts, 37 F.3d at 20.[4]

B. The Application of the "Safe Harbor" Provision to Insurance

Defendants next argue that the so-called "safe-harbor" provision of Title IV of the Disabilities Act was

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[4] Defendants also assert the ADA requires that its standards be "consistent" with those of the Rehabilitation Act. 42 U.S.C. § 12117(b) ("Coordination"). They then point to Rehabilitation Act cases that, they assert, hold that the type of differentiation engaged in in this case is not illegal. They cite two Supreme Court cases, both of which are inapposite. *Alexander v. Choate*, 469 U.S. 287, 304, 105 S.Ct. 712, 721-22, 83 L.Ed.2d 661 (1985) (facially neutral limits on coverage, e.g. limit on number of inpatient hospital days which applies to all persons, regardless of disability, not a violation of the Rehabilitation Act); *Traynor v. Turnage*, 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988) (permissible to deny Rehabilitation Act benefits to veterans if their disability is the result of their own willful misconduct). Although the legislative history of the ADA affirms *Alexander*'s holding that, "employee benefit plans should not be found to be in violation of this legislation under impact analysis simply because they do not address the special needs of every person with a disability, e.g., additional sick leave or medical coverage," that situation is not presented by this case. S.REP. NO. 116, 101st Cong., 1st Sess. 85 (1989). In addition, Defendants fail to recognize that despite its provision requiring "consistent" standards, the ADA was enacted because "current laws [e.g. the Rehabilitation Act] were 'inadequate' to combat 'the pervasive problems of discrimination that people with disabilities are facing.' " *Helen L. v. DiDario*, 46 F.3d 325, 331 (3d Cir.) (quoting S.REP. No. 116, 101st Cong., 1st Sess. 18 (1989)), *cert. denied*, ___ U.S. ___, 116 S. Ct. 64, 133 L.Ed.2d 26 (1995).

designed to protect the insurance industry from being substantively regulated by the other provisions of the Act. Section 12201(c) of the Disabilities Act, captioned "Insurance," states that, "[s]ubchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict (1) an insurer . . . or entity that administers benefit plans . . . from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law. . . . " The section also explains, however, that the above paragraph "shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter." Under Defendants' reasoning, even if Title III could reasonably be construed to regulate the contents of insurance products, the "safe-harbor" provision excludes insurance products from any effect the Act might otherwise have. As long as their policies are consistent with state law, they assert, the Disabilities Act is totally inapplicable.

Unlike the language of Title III, which is quite clear, the meaning of the "safe harbor" provision is not self-evident. In fact, the statute appears to be purposefully vague in order to satisfy contending interest groups. Unable to decide on exactly what it intended to legislate, Congress inserted language which looks in two directions. One provision attempts to appease the insurance industry; the other provisions attempt to help the large group of disabled people. In doing so, Congress has again left this Court in a position to give meaning to conflicting statutory language designed as a political compromise.

We find that, in this instance, the statute is totally ambiguous on its face. The Supreme Court has long held that, in such an instance, we may turn to the legislative

history of the provision for guidance. *Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1547-48, 79 L.Ed.2d 891 (1984). Here, both the House and Senate reports make it clear that the safe harbor provision does not serve to insulate the insurance industry completely from the Disabilities Act in its provision of insurance coverage. One House Report explains that:

> Under the [Disabilities Act], a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not impose increased risks.
>
> . . . .
>
> Moreover, while a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section [codified at 42 U.S.C. § 12201(c)], the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.
>
> For example, a blind person may not be denied coverage based on blindness independent of actuarial risk classification.

H.R.REP. NO. 485, 101st Cong., 2nd Sess., pt. II, at 136-37 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 303, 419-20. The explanation continues:

> In sum, section 501(c) [the safe-harbor provision] is intended to afford to insurers and employers the same opportunities they would

> enjoy in the absence of the legislation to design and administer insurance products and benefit plans in a manner that is consistent with basic principles of insurance risk classification. This legislation assures that decisions concerning the insurance of persons with disabilities which are not based on bona fide risk classification be made in conformity with non-discrimination requirements. Without such clarification, this legislation could arguably find violative of its provisions any action taken by an insurer or employer which treats disabled persons differently under an insurance or benefit plan because they represent an increased hazard of death or illness.
>
> The provisions recognize that benefit plans (whether insured or not) need to be able to continue business practices in the way they underwrite, classify, and administer risks, so long as they carry out those functions in accordance with accepted principles of insurance risk classification.

Id. at 137-38, reprinted in 1990 U.S.C.C.A.N. at 420-21. Another House report states:

> [Section 12201] specifies that titles I, II, and III shall not be construed to restrict various insurance practices on the part of insurance companies and employers, as long as such practices are not used to evade the purposes of this Act.
>
> . . . .
>
> Specifically, [Section 12201(c)(1)] makes it clear that insurers may continue to sell to and underwrite individuals applying for life, health,

> or other insurance on an individually underwritten basis, or to service such products, so long as the standards used are based on sound actuarial data and not on speculation.
>
> . . . .
>
> In sum, [the Disabilities Act] requires that underwriting and classification of risks be based on sound actuarial principles or be related to actual or reasonably anticipated experience.

H.R.REP. NO. 485, 101st Cong., 2nd Sess, pt. III, at 70 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 493. The Senate report contains an explanation nearly identical to those quoted above. *See* S.REP. NO. 116, 101st Cong., 1st Sess. 84-86 (1989). In addition, the Senate Report states:

> The Committee does not intend that any provisions of this legislation should affect the way the insurance industry does business in accordance with the State laws and regulations under which it is regulated. Virtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life. The [Disabilities Act] adopts this prohibition of discrimination. Under the [Disabilities Act], a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

Id. at 84. Thus, when the extensive and explicit legislative history is taken into account, it becomes reasonably clear that insurance practices are protected by the "safe-harbor" provision, but only to the extent that they are consistent with "sound actuarial principles," "actual reasonably

anticipated experience," and "bona fide risk classification."

Defendants also assert that an insurance plan cannot violate the Disabilities Act unless it qualifies as a "subterfuge" under § 12201(c). They argue that the "subterfuge" provision applies only to attempts to avoid the Disabilities Act by means of a "scheme, plan, stratagem or artifice of evasion," citing to the recent case of *Modderno v. King*, 82 F.3d 1059 (D.C. Cir. 1996). In *Modderno*, a Rehabilitation Act case, the D.C. Circuit concluded that a coverage limitation placing a $75,000 maximum lifetime limit on mental health benefits fell within the safe-harbor provision of the Disabilities Act, which has been incorporated by statute into the Rehabilitation Act. The *Modderno* court reasoned that such a coverage limitation would only violate the Rehabilitation Act if it ran afoul of the "subterfuge" provision of § 12201(c). The *Modderno* court noted that the Supreme Court held in two different cases that "subterfuge" language contained in the Age Discrimination in Employment Act ("ADEA") could not apply to plans adopted before the enactment of the ADEA. *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989); *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977). In those cases, the Supreme Court reasoned that the common meaning of the word "subterfuge" includes "scheme, plan, stratagem or artifice of evasion," and that it would be impossible to spell out an intent to "evade" a statute that had not yet been passed. *Betts*, 492 U.S. at 168, 109 S.Ct. at 2861-62. Thus, the *Modderno* court concluded, coverage limitations enacted before the passage of the Disabilities Act do not fall into the subterfuge exception to the Disabilities Act's safe harbor provision. *Modderno*, 82 F.3d at 1065.

Defendants' reliance on *Modderno* is misplaced. Although the *Modderno* court acknowledged that Congress amended the ADEA to include the plan upheld in *McMann* and then removed the "subterfuge" language in response to *Betts*, the court concluded that Congress was "on full alert as to what the Court understood the word [subterfuge] to mean" and decided to include the term in the Disabilities Act anyway. The *Modderno* court ignored explicit language in the legislative history that was clearly meant to resolve this longstanding conflict. Both the Senate and House Reports indicate that the safe-harbor section may not be used as subterfuge to evade the purposes of the Act "regardless of the date an insurance plan or employer benefit plan was adopted." H.R.REP. NO. 485(III), *supra*, at 71, reprinted in 1990 U.S.C.C.A.N. 494; S.REP. NO. 116, *supra*, at 85. Thus, the subterfuge language would apply to the coverage limitation imposed on the Plaintiff in this case if it qualifies as an attempt evade the purposes of the Act, regardless of when it was first instituted. And even if a practice did not qualify as "evasive" under the subterfuge provision, it might still be violative of the Act if it was based on speculation, and not on sound actuarial principles, actual or reasonably anticipated experience, or bona fide risk classification.

Defendants' reliance on the First Circuit's remark in *Carparts* that "there is some indication in the legislative history that the [insurance] industry received this exemption not because its policies would otherwise be substantively regulated under Title III, but because 'there is some uncertainty over the possible interpretations of the language contained in Titles I, II, and III as it applies to

insurance. . . . ' " is not persuasive. *Carparts*, 37 F.3d at 20 (quoting S.REP. NO. 116, 101st Cong., 1st Sess. 84 (1989)). The fact that Congress acknowledged in its own report the obvious ambiguity in the Disabilities Act's statutory language only provides support for our resort to legislative history for clarification. That legislative history weighs in favor of our decision to remand this case for further findings.

Furthermore, as noted above, we are bound to interpret remedial statutes broadly. *Gomez v. Toledo*, 446 U.S. 635, 639, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980). The Disabilities Act was intended to place the disabled on an equal footing with others. Congress was seeking to bring the disabled into the mainstream of American life. To construe the safe harbor provision with the breadth suggested by the Defendants would leave the disabled open to arbitrary discrimination in an area which is vital to that participation. Medical care in the event of illness is a serious concern to every member of society, disabled or non-disabled. It seems unlikely that Congress would leave the insurance industry virtually untouched by a statute that is designed to address "the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4) ("Purpose"). There could hardly be a "good" or "service" more central to the day-to-day life of a seriously disabled person than insurance – for it is often insurance coverage that will determine a disabled person's ability to prevent the disability from limiting his or her participation in society.

In addition, although agency interpretations of statutes are not generally binding on this Court, the Supreme Court has said in the past that where "Congress has not directly addressed the precise question at issue, the court

does not simply impose its own construction on the statute . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). In this instance, the agencies responsible for implementing the Disabilities Act have all found that the contents of insurance products, as a general matter, are covered by the Act. The agencies use the same terminology as the legislative history when describing the types of coverage distinctions which are and are not permissible under the Act. For example, the Department of Justice Technical Assistance Manual states:

> *Insurance*. Insurance offices are places of public accommodation and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts they offer. Because of the nature of the insurance business, however, consideration of disability in the sale of insurance contracts does not always constitute "discrimination." An insurer or other public accommodation may underwrite, classify or administer risks that are based on or not inconsistent with State law, provided such practices are not used to evade the purposes of the [Disabilities Act].
>
> Thus, a public accommodation may offer a plan that limits certain kinds of coverage based on classification of risk, but may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate

> for the same coverage solely because of a physical of mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

Dep't of Justice, *Americans with Disabilities Act Technical Assistance Manual*, § III-3.11000.

As the District Court noted in *Hartford*, "the mere fact that an insurer decides to deny insurance coverage because of plaintiff's disability does not necessarily preclude a claim under the Disabilities Act. It is possible that the decision to deny plaintiff coverage was not based on considerations of underwriting or classifying risks, in which case plaintiff might be entitled to recover under the Disabilities Act." 1995 WL 573430 at *3. Thus, on remand, the Plaintiff will have to show that the distinction between mental and physical disabilities in long-term disability coverage is not justified by "sound actuarial principles" or "actual or reasonably anticipated experience" or "bona fide risk classification."

Defendants argue that their distinction between mental and physical disability is justified. They point to the legislative history of Title I, which states:

> [E]mployers may not deny health insurance coverage completely to an individual based on the person's diagnosis or disability. For example, while it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, e.g., only a specified amount per year for mental health coverage, a person who has a mental health condition may not be denied coverage for other conditions such as for a broken leg or for heart surgery

> because of the existence of the mental health condition.

S.REP. NO. 116, *supra* at 29. Defendants also cite the EEOC's own regulations, which state that, "Typically, a lower level of benefits is provided for the treatment of mental/nervous conditions than is provided for the treatment of physical conditions. . . . Such broad distinctions . . . are not distinctions based on disability." EEAC Brief at 18 (citing EEOC Compliance Manual). Plaintiff responds that long-term disability, unlike health insurance, is a "wage replacement" benefit, not medical coverage. Thus, the Plaintiff concludes, the differentiation between mental and physical ailments may be justified in the health insurance context, but there is no similar basis for the distinction in the long-term disability realm because of the nature of the coverage. Alternatively, Defendants argue, the Disabilities Act does not protect against differentiation between different groups of disabled persons, only against discrimination against the disabled versus the non-disabled. Schering points out that "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation." S.REP. NO. 116, *supra*, at 58. Thus, based on our affirmance of Plaintiff's Title I claim, it is not clear whether Schering remains a proper defendant to the remaining claim in this suit. These issues are now ripe for litigation in the court below.

We note, however, that it is not the role of the courts to write insurance policies. Title IV clearly places a significant amount of discretion in the hands of insurance

companies to write policies that are "consistent with state law." Just as the Supreme Court held that the administrator of an ERISA plan who has been given discretion to interpret the plan may do so in any way that is rational in light of the plan's provisions, Congress clearly intended similar deference to the insurance industry in this area. Thus, as noted above, insurance practices, including the insurance industry's justification for its distinction between mental and physical disabilities, are therefore protected to the extent they are in accord with sound actuarial principles, reasonably anticipated experience and bona fide risk classification. *See Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 956-57, 103 L.Ed.2d 80 (1989).

The District Court's dismissal of Plaintiff's Title III Disabilities Act claim is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

OUIDA SUE PARKER, Plaintiff, v. METROPOLITAN LIFE, INSURANCE COMPANY Defendant.	)	No. 94-2155 Ml/A
OUIDA SUE PARKER, Plaintiff, v. SCHERING-PLOUGH CORPORATION, and SCHERING-PLOUGH HEALTH CARE PRODUCTS, INC., Defendant.	)	No. 94-2506 Ml/BRO

ORDER GRANTING DEFENDANT METROPOLITAN LIFE'S MOTION TO DISMISS ALL CLAIMS ARISING UNDER THE ADA AND GRANTING DEFENDANT METROPOLITAN LIFE'S MOTION FOR SUMMARY JUDGMENT AND GRANTING SCHERING-PLOUGH DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Jan. 17, 95)

This matter is before the Court on defendant Metropolitan Life's Motion to Dismiss All Claims Arising

Under the Americans With Disabilities Act, filed September 2, 1994, Metropolitan Life's Motion for Summary Judgment filed November 21, 1994, and defendants Schering-Plough Corporation and Schering-Plough Health Care Products, Inc.'s Motion to Dismiss filed August 9, 1994.[1]

For the reasons stated, this Court hereby GRANTS defendant MetLife's Motion to Dismiss All Claims Arising Under the ADA, GRANTS defendant MetLife's Motion for Summary Judgment, regarding plaintiff's ERISA claims, and GRANTS defendants Schering-Plough Corporation and Schering-Plough Health Care Products Inc.'s Motion for Summary Judgment.

This is an action for long-term disability benefits pursuant to an employee benefits plan. 29 U.S.C. § 1001 *et seq.*, (Employee Retirement Income Security Act of 1974, as amended). Plaintiff also asserts claims under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, and as to the defendants Schering-Plough Corporation and Schering-Plough Health Care Products ("Schering-Plough defendants"), plaintiff asserts state law claims of negligence and intentional infliction of emotional distress.[2]

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[1] For purposes of this Order, this Court will treat Schering-Plough defendants' Motion to Dismiss as a Motion for Summary Judgment.

[2] In an Order entered October 18, 1994, plaintiff voluntarily dismissed all state law and common law claims against defendant Metropolitan Life.

Initially, as to Schering-Plough defendants, plaintiff also asserted claims under Title VII of the Civil Rights Act of 1991

In plaintiff's remaining claims against Metropolitan Life ("MetLife") and the Schering-Plough defendants, she alleges unlawful discrimination under the ADA, because they administered and offered an employee long-term disability plan that distinguishes between benefits for mental and physical disabilities. Plaintiff asserts that under the ADA MetLife is a "covered entity," that she is a "qualified individual with a disability," and therefore, that she is entitled to relief under the Act.

Plaintiff also asserts that MetLife and the Schering-Plough defendants violated ERISA by wrongfully denying her disability benefits under the Schering-Plough long-term disability plan. Plaintiff claims that defendants MetLife and Schering-Plough have misconstrued the plan language regarding mental illness and that, in fact, plaintiff's illness has a physical and/or chemical origin which removes her condition from the mental or nervous disorders provision of the plan.

Plaintiff further asserts that the defendants, as fiduciaries under ERISA, retained discretionary control of claims and breached their fiduciary duty by denying benefits to her under the plan.

The material facts in this case are not in dispute. Plaintiff is approximately fifty-four (54) years old, is a widow, and is no longer working. Plaintiff was an employee of Schering-Plough Corporation and began her

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and 1964, as amended, 42 U.S.C. § 2000 *et seq.*; and the Tennessee Human Rights Act, T.C.A. § 4-21-101 *et seq.* However, in an Order entered October 21, 1994, this Court granted plaintiff's motion, pursuant to Rule 41(a)(2), to dismiss her claims under Title VII and the Tennessee Human Rights Act.

employment on April 20, 1981. Defendants concede that the plaintiff became disabled on October 29, 1990, and it is not disputed that her disability continues to this date. During plaintiff's employment, she participated in a long-term disability plan provided by Schering-Plough Corporation. The Schering-Plough long-term disability plan was administered at least in part by MetLife.[3] Plaintiff received long-term disability benefits continuously from April 29, 1991, through April 28, 1993, at which time her benefits were discontinued.

It is undisputed that plaintiff received two years of medical benefits for her mental disability in accordance with the terms of her long-term disability plan. The plan provides in pertinent part:

> MENTAL OR NERVOUS DISORDERS. If you are totally disabled due to a mental or nervous disorder, your LTD [long-term disability] benefit is payable for up to twenty-four (24) months. At the end of twenty-four (24) months of LTD benefit payments, benefits will continue only if you are confined in a hospital or other institution qualified to provide care and treatment for your mental or nervous disorder. Further, if you are confined for at least fourteen (14) consecutive days, your LTD benefit is extended to provide benefits for an additional ninety (90) days after

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[3] While MetLife alleges in its Motion for Summary Judgment that it administered the Schering-Plough long-term disability plan, the Schering-Plough defendants have not come forth with any evidence to counter plaintiff's allegations that they too are liable under ERISA as plan administrators. *See* part IV of this Order, granting Schering-Plough Defendants' Motion to Dismiss with respect to plaintiff's ERISA claims.

> the confinement. If during the additional ninety (90) day period you are again confined in a hospital or institution for fourteen (14) days or more, your LTD benefit will be paid during the confinement and the ninety (90) day period following your release.

Summary Plan Description Claims record at 34.

The plan provides for continual disability payments up to age sixty-five (65) for individuals with disabilities other than mental/nervous disabilities, i.e., physical disabilities. *Id.* at 33. There is no dispute that plaintiff's primary diagnosis is major depression. In correspondence dated May 17, 1993, plaintiff's physician, Dr. M.W. Lathram, Jr., specifically stated the following:

> The above-named party, Sue Parker, has just had an office visit. I will reiterate that the records indicate that she has been a patient since 1975 with many hospitalizations for the same diagnosis, major depression. She has had thorough examinations on many occasions, including a most thorough examination by Dr. Paul Neal, clinical psychologist.
>
> Sue continues to show signs of major depression with a great deal of anger, pity, and some suicidal ideation, decreased psychomotor activity, obsessional concern to the point of rumination, which has hindered life efficiency. I have used different approaches, including electroshock therapy in 1991. She had a trial with Lithium for over a year. I have prescribed amitriptyline (Elavil), lorazepam 0.5 QID (Ativan). I am adding the chemical, Tegretol (carbamazine), 400 mg daily to help arrest the process.

> In my opinion the lady has a chronic major depression and all evidence indicates that this is a chemical disorder of a deepseated nature. I hope this letter will aid you in making a decision in considering her for extended disability benefits.

Claims record at 118.

For purposes of this Order addressing consolidated cases 94-2155 and 94-5026, we will first consider plaintiff's ADA claims.

I.

Plaintiff's Claims Under Title I of the ADA

Under Title I of the ADA, plaintiff alleges unlawful discrimination by the Schering-Plough defendants because they maintain on behalf of their employees a long-term disability plan that distinguishes between benefits for mental and physical disabilities. Plaintiff's ADA Title I action against MetLife arises out of MetLife's discontinuation of long-term disability benefit payments to plaintiff under the terms of the Schering-Plough plan in which plaintiff participated. Again, Plaintiff asserts that since the plan provides less benefits for persons with mental disabilities than for persons with physical disabilities, the ADA is violated. The Schering-Plough defendants assert that plaintiff's claims under the ADA should be dismissed because plaintiff is not a "qualified individual with a disability" as defined by the Act and therefore, that plaintiff is not entitled to the Act's protection.[4]

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[4] MetLife also asserts that plaintiff's claims under Title I of the ADA must be dismissed because MetLife is not a "covered entity" as defined by the Act and therefore, that MetLife is not a

Title I of the ADA addresses disability discrimination by employers. Section 102(a) of Title I of the ADA states that "no covered entity shall discriminate against a *qualified individual with a disability*. . . . " 42 U.S.C. §1211(a). (Emphasis added).

A qualified individual with a disability is defined, in pertinent part, as:

> an individual *with a disability* who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. (emphasis added).

42 U.S.C. § 12111(8).

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proper defendant under the ADA. Title I of the ADA, 42 U.S.C. § 12211, *et seq.* provides in pertinent part that "no *covered entity* shall discriminate against a qualified individual with a disability . . . " 42 U.S.C. § 1211, (Emphasis added). "Covered equity" is defined as an "employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. § 12111(2). MetLife asserts that plaintiff's claim under Title I should be dismissed because MetLife is not plaintiff's employer and is therefore not a covered entity as provided for by the Act. *But see* 42 U.S.C. § 1211(5)(A); *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *Peters v. Wayne State Univ.*, 691 F.2d 235, 237 (6th Cir. 1982), *cert. granted*, judgment vacated and case remanded on different grounds, 463 U.S. 1223 (1983) (citing *NLRB v. Local No. 64*, 497 F.2d 1335, 1366 (6th Cir. 1974); *Carparts Dist. Ctr., Inc. v. Automotive Wholesalers Assoc. of New England, Inc.*, No. 93-1954, 1994 WL 543530 at * 4 (1st Cir. Oct. 12, 1994) (citing *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054 (2d Cir. 1982), *vacated* and *remanded sub nom, Long Island Univ. v. Spirt*, 463 U.S. 1223 (1983), reinstated on remand subject to modification on other grounds, 735 F.2d 23 (2d Cir. 1983), *cert. denied*, 469 U.S. 881 (1984)).

In *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768 (8th Cir. 1987), *cert. denied*, 485 U.S. 938 (1988), the Eighth Circuit considered whether an employee on disability leave who was no longer able to perform the essential functions of her job and who claimed disability discrimination in the provision of health and disability benefits was entitled to the protection of the Rehabilitation Act of 1973. Because provisions under the ADA are to be interpreted consistent with similar requirements under the Rehabilitation Act, the *Beauford* court's analysis is instructive in the present case. *See* 42 U.S.C. § 12117(b); *Tyndall v. Nat. Educ. Centers*, 31 F.3d 209 (4th Cir. 1994).

In considering the employee's claim, the court first noted that the clear language of the Rehabilitation Act extended the Act's protection only to "otherwise qualified handicapped individual[s]." The court next considered the Supreme Court's interpretation of an "otherwise qualified individual" under the Rehabilitation Act as "one who is able to meet all of a program's requirements in spite of his handicap." *Id.* at 771 (citing *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979)). Finally, the Eighth Circuit found that both the statute's language and its interpretation by the Supreme Court indicated that section 504 of the Rehabilitation Act was designed to prohibit discrimination within an employment relationship in which the employee is able to do the job in question. Therefore, the court denied the employee's claim because by her own admission she was no longer able to perform her job. *Id.*

While the Eighth Circuit determined whether the plaintiff in *Beauford* was "qualified" at the time she claimed benefits under the plan rather than at the time

she was offered admission into the plan, the result is the same as in the present case. The totally disabled plaintiff in *Beauford* did not have standing to sue under the Rehabilitation Act, just as the plaintiff in the instant case does not have standing to sue under the ADA.

In denying the employee's claim for disability benefits, the Eighth Circuit noted that although it may seem undesirable to discriminate against a handicapped employee who is no longer able to do his or her job, this sort of discrimination is not within the protection of section 504 of the Rehabilitation Act. *Id.*

As with plaintiff in the present case, it may seem undesirable and perhaps unpalatable that a totally disabled individual is not entitled to relief under Title I of the ADA. However, the plain language of the Act clearly indicates that the ADA was designed to afford relief only to those individuals with disabilities who can perform the essential functions of the job that they hold or seek. *See* ADA § 102(a); 42 U.S.C. § 12112(a); 42 U.S.C. § 12111(8). *See also Garcia-Paz v. Swift Textiles, Inc.*, No. CIV.A. 94-2076-KHV, 1995 WL 7761 at * 5 (D.Kan. Jan. 2, 1995).

Furthermore, courts interpreting the ADA, have found that only persons with disabilities who are "qualified" for the position they hold or desire may state a claim for discrimination under the Act. *See Tyndall v. Nat. Educ. Centers*, 31 F.3d 209 (4th Cir. 1994) (establishing employment discrimination under the ADA requires: first, that plaintiff have a "disability;" second, that plaintiff be "qualified" for the job; and third, the job action in question must constitute unlawful "discrimination" based on the disability); *See also Ethridge v. State of Alabama* 860 F. Supp. 808 (M.D. Ala. 1994).

A review of the legislative history of Title I also supports the conclusion that this portion of the statute seeks to prohibit discrimination only against qualified individuals with disabilities.[5] Thus, although plaintiff may have been "qualified" to perform the essential functions of her job at the time of her enrollment in the plan, she has not shown that she was a "qualified individual *with a disability*" at that time.[6] Thus, plaintiff is not a "qualified individual with a disability" as defined by the Title I of the Act, and plaintiff does not have standing to sue under Title I of the ADA. Therefore, defendants'

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[5] The legislative history of the ADA states that the term "qualified" refers to whether the individual is qualified at the time of the job action in question. S. Rep. No. 116, 101st Cong., 1st Sess. 26 (1989). Assuming that plaintiff's enrollment in the plan is the "job action in question" and that plaintiff was qualified to perform her job, plaintiff does not allege that she was a "qualified individual *with a disability*" at the time of her enrollment in the plan. *See also* S. Rep. No. 116, 101st Cong., 1st Sess. 26 (1989); H.R. Rep. No. 485, part 2, 101st Cong., 2d Sess. 55 (1990) (explaining that the basic concept behind the term "qualified individual with a disability" as used in Title I is so that an employer may require every employee to be qualified to perform the essential functions of a job); H.LR. Rep. No. 485, part 3, 101st Cong., 2d Sess., U.S. Code Cong. & Admin. News 1990, pp. 267, 337, 453 (1990) (stating that the underlying premise of Title I is that persons with disabilities should not be excluded from job opportunities *unless* they are actually unable to do the job).

[6] Plaintiff cites *Schroeder v. Connecticut Gen. Life Ins. Col., et al.*, Civil Action No. 93-M-2433 (1994) as support for her position that she is a "qualified individual with a disability." Plaintiff's Response to Schering-Plough's Motion to Dismiss at 8. However, the court in *Schroeder* was not presented with, nor did it address, who is a "qualified individual with a disability" within the meaning of Title I of the ADA. Thus, *Schroeder* does not support plaintiff's contention that she is a "qualified individual with a disability" as defined by the Act.

Motions to Dismiss Plaintiff's Claims Under Title I of the ADA are hereby GRANTED.

II.

Plaintiff's Claims Under Title III of the ADA

Plaintiff also asserts[7] that defendants are liable under Title III of the ADA. Title III is concerned with handicap-based discrimination that prevents equal access to places

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[7] In her response to Schering-Plough defendants' Motion to Dismiss, plaintiff cites Title III as providing that insurers "may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, . . . solely because of [an individual's] physical or mental impairment." (Response at 9 (citing H.R. Rep. No. 101-485, part 2, 101st Cong., 2d Sess. 129 (1990). However, the ADA's provisions addressing discrimination in employee health insurance plans are found in Title V of the Act, entitled Miscellaneous Provisions. Title V § 501 is entitled "Construction" and contains a provision discussing the interplay between the statute's nondiscrimination provisions and employee health benefit plans. Section 501(c) states in pertinent part that Titles I, II, and III of the ADA shall not be construed to prohibit or restrict –

> (1) an insurer, hospital or medical service company, . . . or entity that administers benefit plans, . . . from underwriting risks, . . . that are based on or not inconsistent with State law; or (2) a person or organization covered by this chapter from establishing, sponsoring . . . or administering the terms of a bona fide benefit plan that are based on underwriting risks, . . . that are based on or not inconsistent with state law;

of "public accommodation." 42 U.S.C. § 12181, *et seq.* Title III provides that:

> [n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a).

A. Plaintiff's ADA Title III Claim Against MetLife

The Act defines public accommodation to include a "laundromat, dry-cleaner, bank, . . . insurance office, professional office of a health care provider, hospital, or other service establishment," 42 U.S.C. § 12181(7)(F). Defendant MetLife concedes that it maintains offices that would fall under this definition. However, MetLife

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provided that points (1) and (2) are not used as a subterfuge to evade the purpose of titles I, II, and III of this legislation. *See* 42 U.S.C. 12201(c).

The legislative history of Title V reiterates that the main purposes of the ADA include prohibiting discrimination in employment, public services, and places of public accommodation and that no provisions of the ADA should affect the way insurance industry does business in accordance with the State laws and regulations under which it is regulated. *See* S.Rep. No. 116, 101st Cong., 1st Sess. 85 (1989). Thus, Title V of the ADA governs the interplay between the Act's anti-discrimination provisions in Titles I, II, and III and health insurance plans offered by employers to their workers, and nothing in the legislative history of the Act suggests that claims may be brought independently under this section of the ADA.

asserts that it is not a proper defendant under this provision of the Act because plaintiff was not denied access to or equal enjoyment of any of its facilities by reason of her disability.

In *Pappas v. Bethesda Hosp. Assoc.*, 861 F. Supp. 616 (S.D. Ohio 1994), the court considered whether an administrator of an employee benefit plan that allegedly discriminated in the provision of health insurance benefits was liable under Title III of the ADA. Interpreting Title III according to the ordinary, common meaning of the words in the statute, the court found that the references throughout Title III make it clear that "its scope is limited to discrimination in the provisions of goods, services, facilities, privileges, advantages or accommodations based on a disabled person's *physical ability* to make use of those goods, services, etc." (emphasis added). *Id.* at 620. *Contra Carparts Dist. Ctr., Inc. v. Automotive Wholesalers Assoc. of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994).

Because the plaintiff's claim in *Pappas* had nothing to do with an inability to make physical use of the services of a place of public accommodation, the court dismissed plaintiff's claims under Title III of the ADA. Likewise, in the present case, there is no nexus whatsoever between the plaintiff's alleged discrimination and her inability to make physical use of any of MetLife's services. Because this Court also finds that the scope of Title III only addresses discrimination based on a disabled person's physical abilities to make use of the goods and services of a place of public accommodation, we find that plaintiff has failed to state a claim against MetLife under Title III of the ADA upon which relief can be granted.

B. Plaintiff's ADA Title III Claim Against The Schering-Plough Defendants

The Schering-Plough defendants also assert that they are not liable under Title III of the ADA, contending that the Act does not apply to them because Title III was not intended by Congress to govern any terms or conditions of employment by providers of public accommodations. *See* S.Rep. No. 116, 101st Cong., 1st Sess. 58 (1989) ("Title III is not intended to govern any terms or conditions of employment by providers of public accommodations . . . employment practices are governed by title I of this legislation.").

Because the legislative history of the ADA clearly indicates that Title III does not govern employment practices, and because there is no nexus whatsoever between the plaintiff's alleged discrimination and her inability to make physical use of any of the services of Schering-Plough defendants plaintiff has also failed to state a claim against the Schering-Plough defendants on which relief can be granted.

Based on the foregoing reasons, defendants' Motions to Dismiss Claims Arising Under Title III of the ADA are GRANTED.

III.

Plaintiff's ERISA claims against MetLife

Plaintiff challenges MetLife's denial of long term disability benefits allegedly due her under the plan pursuant

to 29 U.S.C. § 1132(a)(1)(B).[8] MetLife moves for summary judgment with respect to plaintiff's ERISA claims, asserting that there is no dispute as to any issue of material fact and that as a matter of law, MetLife's denial of plaintiff's long-term disability benefits after twenty-four months was proper.

In considering MetLife's Motion for Summary Judgment, this Court must determine the proper standard by which to review MetLife's denial of plaintiff's long-term disability benefits. In *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 956-57, 103 L.Ed.2d 80 (1989), the Supreme Court held that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Where the administrator or fiduciary authority has discretionary authority, an abuse of discretion standard applies. *Id.*, 489 U.S. at 109-111, 109 S.Ct. at 954; *Perry v.*

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[8] This provision of ERISA allows a plan participant or beneficiary to bring a civil action to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. 29 U.S.C. 1132(a)(1)(B). In Plaintiff's Response to MetLife's Motion for Summary Judgment, plaintiff also requests relief under 29 U.S.C. § 1132(a)(1)(A) for MetLife's alleged breach of its statutory obligation under 29 U.S.C. § 1132(c)(1)(B). 29 U.S.C. 1132(c)(1)(B) addresses a plan administrator's refusal to supply requested information and the resulting penalties. *See* 29 U.S.C. § 1132(c)(1)(B). However, as plaintiff has not asserted any facts to support her conclusory allegations that MetLife failed to supply requested information, this Court will not consider plaintiff's claims for damages under 29 U.S.C. § 1132(c)(1)(B).

Simplicity Engineering, 900 F.2d 963, 965 (6th Cir. 1990). *See also Davis v. Kentucky Fin. Cos. Retirement Plan*, 887 F.2d 689, 693-94 (6th Cir. 1989), *cert. denied*, 495 U.S. 905, 110 S.Ct. 1924, 109 L.Ed.2d 288 (1990), *reh'g denied*, 496 U.S. 932, 110 S.Ct. 2634, 110 L.Ed.2d 654 (1990) (applying arbitrary and capricious standard of review where plan grants discretion to plan administrator).

It is undisputed that the following provision is contained in the Master Policy pursuant to which long-term disability benefits are provided under the Schering-Plough LTD Plan.

> DISCRETIONARY AUTHORITY OF PLAN ADMINISTRATOR AND OTHER PLAN FIDUCIARIES
>
> In carrying out their respective responsibilities under the plan, the plan administrator and other plan fiduciaries shall have discretionary authority to interpret the terms of the plan and to determine eligibility for and entitlement to plan benefits in accordance with the terms of the plan. Any interpretation or determination made pursuant to such discretionary authority shall be given full force and effect, unless it can be shown that the determination was arbitrary and capricious.

Master Policy Claims record at 27.

Because the plan provision at issue in the present case clearly grants the plan administrator and fiduciaries discretion to interpret the terms of the plan and to determine benefit eligibility under the plan, a deferential standard of review is appropriate. *See Baker v. United Mine Workers of Am. Health & Retirement Funds*, 929 F.2d 1140, 1144 (6th Cir. 1991) (employing deferential review where

plan granted trustee discretionary authority to determine issues concerning eligibility for benefits); *Johnson v. Eaton Corp.*, 970 F.2d 1569, 1570-71 (6th Cir. 1992), *reh'g denied*. However, plaintiff asserts that the arbitrary and capricious standard of review is not proper in this case because discretionary authority under the plan is limited only to the Schering-Plough Corporation, whom plaintiff alleges is the plan administrator.[9]

According to the record in this case, however, it is undisputed that MetLife administered benefits to plaintiff under the Schering-Plough long-term disability plan and that MetLife made the final decision denying plaintiff long term disability benefits under the plan.[10] Thus,

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[9] While the plan does state that Schering-Plough is the employer and plan administrator, (Claims Record at 26), plaintiff has not shown that Schering-Plough maintained exclusive discretion with regard to determining eligibility under the plan and construing the terms of the plan. In support of her assertion that discretionary authority under the plan is limited to Schering-Plough, the plaintiff relies on a provision in the Summary Plan Description that states: "Schering-Plough presently offers long term disability benefits to its employees but reserves the right to terminate, suspend, withdraw, amend, or modify benefits in whole or in part and to increase any premiums payable by employees at any time." Claims Record at 29. However, this provision, in and of itself, does not indicate that discretion to determine eligibility for benefits under the plan or to interpret the language of the plan was limited only to Schering-Plough.

[10] *See* Plaintiff's Complaint against defendant MetLife at ¶ 4 (defendant [MetLife] provides and/or administers long-term disability benefits to the employees of Schering-Plough Corporation); Plaintiff's Complaint against Schering-Plough defendants at ¶ 5 (plaintiff was covered under a plan of disability benefits provided by her employer and administered

plaintiff's arguments that discretionary authority under the plan is limited only to the Schering-Plough Corporation and that MetLife's denial of benefits to plaintiff should not be reviewed under the arbitrary and capricious standard are without merit.

Furthermore, it is undisputed that MetLife is a fiduciary under the plan[11], and the plan's language expressly gives fiduciaries discretionary authority under the plan. Because it is clear that the plan in this case expressly gives discretionary authority to MetLife to determine eligibility for benefits and to construe the terms of the plan, it is proper to review MetLife's denial of benefits to plaintiff under the arbitrary and capricious standard of review.

Since this Court has determined that MetLife's denial of benefits to plaintiff must be reviewed under an arbitrary and capricious standard, we must now determine

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by MetLife); Affidavit of James P. Hartz, MetLife Staff Consultant, admitting MetLife serves as Claims Administrator for the Schering-Plough plan. Furthermore, the fact that MetLife administered benefits to plaintiff under the Schering-Plough plan is evidenced by the plain language of the plan which provides that claim forms are forwarded to MetLife by the employer for processing and that MetLife is responsible for reviewing all claims denied in whole or in part. Claims Record at 25. Additionally, the correspondence with plaintiff informing her of the initial decision to deny her long-term disability benefits under the plan and the subsequent letter affirming the initial denial of benefits came from MetLife's office in Utica, New York. Claims Record at 110 and 131.

[11] *See* MetLife's Answer to Plaintiff's Complaint at ¶2; Plaintiff's Response to Defendant MetLife's Motion for Summary Judgment at 7.

whether, as a matter of law, MetLife's actions comported with this standard. It is well-established that the arbitrary or capricious standard is the least demanding form of judicial review of administrative action. *Davis v. Kentucky Fin. Cos. Retirement Plan*, 887 F.2d 689, 693-94 (6th Cir. 1989), *cert. denied*, 495 U.S. 905, 110 S.Ct. 1924, 109 L.Ed.2d 288 (1990).

In *Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979 (6th Cir. 1991), the Sixth Circuit stated that an "ERISA benefit plan administrator's decisions on eligibility for benefits are not arbitrary and capricious if they are 'rational in light of the plan's provisions.' " *Id.* at 984 (quoting *Daniel v. Eaton Corp.*, 839 F.2d 263, 267 (6th Cir. 1988), *cert. denied*, 488 U.S. 826, 109 S.Ct. 76, 102 L.Ed.2d 52 (1988)). However, "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'factor[] in determining whether there is an abuse of discretion.' " *Id.* (quoting *Bruch*, 489 U.S. at 114-15, 109 S.Ct. at 956-57 (citations omitted)).

Because premiums are paid to MetLife by or on behalf of plaintiff under the Schering-Plough plan, plaintiff alleges that it would be adverse to MetLife's financial interests to extend disability benefits to individuals such as the plaintiff. Thus, plaintiff contends that MetLife operated under an alleged conflict of interest in denying plaintiff long-term disability benefits under the plan, and that this Court should apply a de novo standard of review, giving less deference to MetLife's decision.

However, the Sixth Circuit has held that even when there is an alleged conflict of interest by the plan administrator that the arbitrary and capricious standard still applies. *See Wells v. U.S. Steel & Carnegie Pension Fund*,

Inc., 950 F.2d 1244, 1247 (6th Cir. 1991), *reh'g denied* (citing *Davis v. Kentucky Fin. Cos. Retirement Plan*, 887 F.2d 689, 694 (6th Cir. 1989), *cert. denied*, 495 U.S. 905, 110 S.Ct. 1924, 109 L.Ed.2d 288 (1990)). Therefore, we will apply the arbitrary or capricious standard of review and simply consider MetLife's alleged conflict of interest as one of the factors in our determination of whether MetLife's denial of benefits was reasonable in light of the Schering-Plough plan provisions.[12]

The Schering-Plough long-term disability plan contains a "primary benefit period" and a "secondary benefit period" both of which are described in the Master Policy. Claims record at 18; *See also* Claims record at 34. For persons like plaintiff, who are younger than sixty-four (64) years of age and whose disability extends beyond twenty-four (24) months, the primary benefit period is twenty-four (24) months, after which a secondary benefit period exists up to the age of sixty-five (65) or seventy (70), depending on how old the claimant was when the disability began. The provision under which plaintiff was denied benefits at the end of her "primary benefit period" provides:

> [N]o monthly benefits will be paid . . . for any part of the Secondary Benefit Period during which your are not confined as an inpatient in a Hospital, *if your Total Disability in any way results from, or is caused or contributed to by, a mental or nervous disorder.* (Emphasis added).

Master Policy Claims record at 18.

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[12] In this case, we will review of MetLife's denial of benefits based upon the record before MetLife at the time the decision regarding plaintiff's benefits was made. *Perry v. Simplicity Engineering*, 900 F.2d 963, 966 (6th Cir. 1990).

The record before MetLife shows that plaintiff was not confined to a hospital. *See* Dr. Lathram's answer to question 13 in the Supplemental Statement of Functional Capacity. Dr. Lathram executed this statement and sent it to MetLife on April 3, 1993, twelve days before MetLife notified plaintiff of the termination of her benefits effective April 29, 1993. Claims record at 108.[13]

Since plaintiff was not confined to a hospital in April 1993, when MetLife determined her eligibility for long-term disability benefits, MetLife had to determine whether plaintiff's total disability in any way resulted from, or was caused or contributed by, a mental or nervous disorder. Based on plaintiff's primary diagnosis of major depression and plaintiff's symptoms and method of treatment, MetLife's determination that plaintiff's disability resulted at least in part from a mental or nervous disorder was not unreasonable.

In *Brewer v. Lincoln Nat. Life Ins. Co.*, 921 F.2d 150 (8th Cir. 1990), *cert. denied*, 501 U.S. 1238, 111 S.Ct. 2872, 115 L.Ed.2d 1038 (1991), the Eighth Circuit considered whether one suffering from affective mood disorder was subject to a coverage limitations under health benefit policy, which limited coverage for mental illnesses. The court rejected the claimant's arguments that the possible biological causes of the condition at issue excluded it from the policy's definition of "mental illnesses." Finding that the terms of an ERISA

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[13] Prior Supplemental Statements of Functional Capacity prepared by Dr. Lathram and contained in the record indicate that plaintiff was hospital-confined for a short period in 1991, but not thereafter. *See* Claims record at 78, 96, and 102.

plan should be given their ordinary and not specialized meanings, the *Brewer* court stated:

> The cause of a disease is a judgment for experts, while laymen know and understand symptoms. Laymen undoubtedly are aware that some mental illnesses are organically caused while others are not; however, they do not classify illnesses based on their origins. Instead, laypersons are inclined to focus on the symptoms of an illness; illnesses whose primary symptoms are depression, mood swings and unusual behavior are commonly characterized as mental illnesses regardless of their causes.

Id. at 154.

Thus, in determining whether the condition could be classified as a "mental illness" under the policy, the *Brewer* court did not focus on the condition's etiology. Moreover, as the policy language did not limit "mental illnesses" to only those with a non-organic origin, the court declined to adopt such a limited construction of the term. *See also Stauch v. Unisys Corp.*, 24 F.3d 1054, 1055 (8th Cir. 1994); *Equitable Life Assurance Society v. Berry*, 212 Cal. App. 3d 832, 260 Cal Rptr. 819, 824 (1989). *Contra Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir. 1990), *cert. denied*, 498 U.S. 1013, 111 S.Ct. 581, 112 L.Ed.2d 587 (1990). The reasoning employed in *Brewer* is consistent with the general federal common law principle requiring courts to give effect to the plain meaning of policies providing benefits through ERISA-regulated plans and is applicable in the present case. *See Arnold v. Life Ins. Co. of North America*, 894 F.2d 1566, 1567 (11th Cir. 1990), *reh'g denied*, 903 F.2d 827 (11th Cir. 1990); *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1441 (9th Cir. 1990).

After plaintiff received MetLife's letter informing her that her benefits would be terminated as of April 23, 1993, plaintiff informed MetLife that her disability was caused "in large" by a chemical deficiency in the brain. Therefore, plaintiff claimed that her disability could not be considered "completely" as a mental or nervous condition. Claims record at 114.

After considering plaintiff's letter, MetLife, for a second time, denied plaintiff long-term disability benefits under the plan. Upon MetLife's second denial of benefits to plaintiff, Dr. Lathram sent MetLife a letter on May 17, 1993, stating that plaintiff "has chronic major depression and all evidence indicates that this is a chemical disorder of a deepseated nature." Claims record at 118.

MetLife then referred the file to its consulting psychiatrist, Josef H. Weissberg, M.D. Dr. Weissberg reviewed plaintiff's file and stated the following:

> Irrespective of any chemical factors in its etiology, major depression is a DSM III diagnosis; Ms. Parker is being treated by a psychiatrist with psychoactive medications. In my opinion, her major depression should be reimbursed under the nervous/mental illness clause of the contract.

Claims record at 122.

Based upon its review of all information submitted by plaintiff and her health care provider and the review by Dr. Weissberg, MetLife ultimately determined that plaintiff's total disability resulting from major depression and anxiety was characterized as having in some way

resulted from or having been caused by or contributed to by a mental or nervous disorder.[14]

Based on a thorough review of the record that was before MetLife when it made is final determination denying plaintiff long-term disability benefits, this Court finds that MetLife's decision was reasonable in light of the Schering-Plough plan provisions – despite any alleged conflict of interest on MetLife's part. The broad language of the provision under which plaintiff was denied long-term disability benefits clearly states that if a claimant's disability "in any way results from, or is caused or contributed by, a mental or nervous disorder," which does not result in the claimant being confined as an inpatient in a hospital, then benefits are not payable in the secondary period. The provision says nothing about what the origin or cause of the mental disorder must be, and under *Brewer,* MetLife properly determined that regardless of the origins of plaintiff's depression that plaintiff should be reimbursed under the nervous/mental illness clause of the policy. *See Brewer* 921 F.2d at 154.

Considering the breadth of the Schering-Plough plan provision, in light of the fact that plaintiff was being treated by a psychiatrist with psychoactive medications, MetLife's denial of benefits to plaintiff was not arbitrary or capricious under the circumstances. The Sixth Circuit has stated that "[w]ithout a showing of internal inconsistency or bad faith or some other ground for calling the [administrator's] determination into question, the arbitrary and capricious standard

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[14] On June 15, 1993, MetLife informed plaintiff of its final decision to deny her claim for long-term disability benefits. Claims record at 131.

demands affirmance of an administrator's construction of a plan." *Sutter v. BASF Corp.*, 964 F.2d 556, (6th Cir. 1992) (citing *Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689, 695 (6th Cir. 1989), *cert. denied*, 495 U.S. 905, 110 S.Ct. 1924, 109 L.Ed.2d 288 (1990)). Thus, as there is no dispute as to any issue of material fact and plaintiff has not shown that MetLife's determination was unreasonable, inconsistent, or made in bad faith, MetLife's denial of long-term benefits to plaintiff must stand. Therefore, MetLife's Motion for Summary Judgment regarding plaintiff's ERISA claims is hereby GRANTED.

IV.

Plaintiff's ERISA claims against the Schering-Plough Defendants:

Although plaintiff's complaint does not identify specific provisions of ERISA that the Schering-Plough defendants are alleged to have violated, the nature of plaintiff's ERISA claims appears to be an action for wrongful denial of benefits under section 502(a)(1)(B).[15]

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[15] Because plaintiff claims that the Schering-Plough defendants allegedly breached a fiduciary duty to her, (Plaintiff's Response to Schering-Plough defendants' Motion to Dismiss at 10), it may appear that plaintiff seeks to bring a claim against defendants under section 409(a) of ERISA, which establishes liability for breach of fiduciary duty. *See* 29 U.S.C. § 1109(a). While it is disputed whether defendants are fiduciaries under ERISA, even assuming that defendants are fiduciaries, section 409(a) provides relief only for a plan and not for individual participants. *Tregoning v. American Community Mutual Ins. Co.*, 12 F.3d 79, 83 (6th Cir. 1993) (citing *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985). Thus, plaintiff fails to state a claim against Schering-

Section 502(a)(1)(B) of ERISA provides that a participant or beneficiary of a plan may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of his plan, or to clarify his rights to future benefits under the plan[.]" 29 U.S.C. § 1132(a)(1)(B).

Defendants assert that plaintiff's claims under section 502(a)(1)(B) of ERISA should be dismissed because an employer is not a proper defendant under this section of ERISA, or in the alternative, that the plaintiff must also include the plan itself as party in order to obtain relief under this section.

However, in *Daniel v. Eaton Corp.*, 839 F.2d 263, 266 (6th Cir. 1988), *cert. denied*, 488 U.S. 826, 109 S.Ct. 76, 102 L.Ed.2d 52 (1988), the Sixth Circuit found that an employer is a proper party defendant in an action for benefits if it is shown that the employer controls the administration of the plan. *See also Renney v. White Consol. Indus., Inc.*, No. G88-408 CA1, 1990 WL 482748 at *7 (W.D. Mich. Apr. 8, 1990), *aff'd., Renney v. A.B. Electrolux*, 952 F.2d 403 (6th Cir. 1992) (finding an employer is a proper party defendant under section 502(a)(1)(B) because while ERISA provides that an employee benefit plan may be sued as an entity, 29 U.S.C. § 1132(d)(1), the statute does not explicitly identify the proper party defendant in a suit by a plan beneficiary for the recovery of benefits under a plan).

Furthermore, in *Renney*, the court also found that plaintiff's failure to name the plan as defendant was not

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Plough defendants for which relief can be granted under section 409(a) of ERISA.

fatal to plaintiff's action because the employer had sufficient notice that it was a defendant in its capacity as administrator. Thus, the employer, as the plan administrator, was a property to the suit. *Id.*

In the present case, the Court will treat defendants' motion to dismiss plaintiff's ERISA claims as a Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure because it is necessary to look at Schering-Plough's long-term disability plan to determine whether the Schering-Plough defendants administered the plan with respect to the plaintiff in this case. In this case, the Schering-Plough defendants, as the moving party, have not shown that they are not the plan administrator. While this fact is disputed, it is not material because this Court has determined that the administration of the plan with respect to plaintiff did not violate ERISA.[16] Thus, any ERISA claims against the Schering-Plough defendants must fail regardless of whether the Schering-Plough defendants were also plan administrators in conjunction with MetLife. Thus, plaintiff's ERISA claims against the Schering-Plough defendants are hereby DISMISSED.

V.

Plaintiff's State Law Claims Against Schering-Plough Defendants:

Plaintiff's complaint asserts claims for breach of contract and negligent and intentional infliction of emotional

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[16] *See* Part III, of this Order, granting MetLife's Motion for Summary Judgment regarding plaintiff's ERISA claims.

distress. 29 U.S.C. § 1144 clearly states that ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." The Sixth Circuit has repeatedly held that virtually all state law claims relating to an employee benefit plan are preempted by ERISA. *Cromwell v. Equicor-Equitable HCA Corp*, 944 F.2d 1272, 1276 (6th Cir. 1991), *cert. dismissed*, ___ U.S. ___, 113 S.Ct. 2, 120 L.Ed.2d 931 (1992). Additionally, a state law "relates to" an employee benefit plan "if it has a connection with or reference to such a plan." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 87, 103 S.Ct. 2890, 2895, 77 L.Ed.2d 490 (1983).

Specifically, in *Tassinare v. American Nat. Ins. Co.*, 32 F.3d 220, 224 (6th Cir. 1994), the Sixth Circuit held that employees' claims for breach of contract and intentional infliction of emotional distress arising from an employer's failure to make matching payments to a pension plan "related to" the plan and were preempted by ERISA. In the present case, plaintiff alleges that her claims for breach of contract and negligent and intentional infliction of emotional distress arise from defendants' failure to pay benefits under the Plan. Thus, plaintiff's state law claims "relate to" the plan and are preempted by ERISA. Because plaintiff's state law claims are clearly preempted by ERISA, plaintiff has failed to state a claim under state law on which relief can be granted. Therefore, the Schering-Plough defendants' motion to dismiss plaintiff's state law claims is GRANTED.

Conclusion

For the reasons stated above, this Court hereby GRANTS defendant MetLife's Motion to Dismiss All Claims Arising Under the ADA, GRANTS defendant MetLife's Motion for Summary Judgment, regarding plaintiff's ERISA claims, and GRANTS defendants Schering-Plough Corporation and Schering-Plough Health Care Products Inc.'s Motion for Summary Judgment.

SO ORDERED, THIS 17 DAY OF JANUARY, 1995.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 10 1997
CLERK

No. 97-747

(2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

OUIDA SUE PARKER,
Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
SCHERING-PLOUGH CORPORATION and
SCHERING-PLOUGH HEALTH CARE PRODUCTS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY

Of Counsel
RONALD S. RAUCHBERG
STEVEN C. KRANE
PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036
(212) 969-3490

ALLAN M. MARCUS
Counsel of Record
AMY K. POSNER
One Madison Avenue
New York, New York 10010
(212) 578-3722
Counsel for Respondent Metropolitan Life Insurance Company

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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OUIDA SUE PARKER,

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v.

METROPOLITAN LIFE INSURANCE COMPANY,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY

Respondent Metropolitan Life Insurance Company ("MetLife") respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the *en banc* decision of the United States Court of Appeals for the Sixth Circuit in *Parker v. Metropolitan Life Ins. Co., et al.*

STATEMENT OF THE CASE

Petitioner was an employee of Respondent Schering-Plough Corporation ("Schering") and a participant in Schering's Long Term Disability ("LTD") Plan ("Plan"). MetLife issued a policy of group insurance to Schering to provide LTD benefits under the Plan to eligible participants. Schering was the Plan Administrator of its employee welfare benefit plan. MetLife was the Plan's claims

administrator. On October 29, 1990 Petitioner applied for LTD benefits, claiming to be totally disabled due to a primary diagnosis of "major depression" and a secondary diagnosis of "generalized anxiety disorder." Her claim was approved and she received monthly LTD benefits from April 29, 1991 to April 28, 1993. LTD benefits were terminated under the Plan's provision limiting benefits to two years for total disability which "in any way results from, or is caused or contributed to by, a mental or nervous disorder." The Plan provides LTD benefits for disabilities resulting from physical disorders up to age 65.

Petitioner filed lawsuits (subsequently consolidated) against Schering and MetLife alleging unlawful discrimination under Title I and III of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, because of the Plan's limitation of benefits provision for disabilities due to mental/nervous disorders. Upon motions by Respondents, the United States District Court for Western District of Tennessee dismissed Petitioner's claims under Titles I and III of the ADA.[1] Petitioner's Appendix ("App."), pp. 80-84.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. A three-judge panel affirmed the district court's dismissal of Petitioner's Title I claim, holding that, because she was unable to work, she was not a "qualified individual with a disability."[2] App., pp. 48-52. However, the panel reversed the district court's dismissal of the Title III claim. App., pp. 54-65.

Following a rehearing *en banc,* the Sixth Circuit reversed the appellate panel's Title III decision and affirmed the district court's decision.[3] The Sixth Circuit held that Title III did not prohibit an employer from providing to

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[1] The district court decision is reported at 875 F. Supp. 1321 (W.D. Tenn. 1995).

[2] The panel decision is reported at 99 F.3d 181 (6th Cir. 1996).

[3] The *en banc* Sixth Circuit decision is reported at 121 F.3d 1006 (6th Cir. 1997).

its employees a disability benefits plan funded by a group insurance policy which contains a provision for longer duration of benefits for those who become disabled due to physical illness than those who become disabled due to mental illness. The Sixth Circuit reasoned that Title III did not apply because a disability benefit plan offered by an employer is not a good offered by a place of public accommodation. "There is thus no nexus between the disparity in benefits [under the Plan] and the services which MetLife offers to the public from its insurance office." App., pp. 10-12. The *en banc* court noted that Petitioner did not and could not access a group disability policy from a MetLife insurance office; the group insurance policy that MetLife provided to Schering was not available to the general public. App., pp. 12-13. The Sixth Circuit further concluded that Title III does not regulate the contents of goods and services offered by public accommodations, but rather only regulates access to those goods and services. App., p. 13-14. The *en banc* court also held that the disparity in benefits provided by the Plan and policy is not prohibited by the ADA, which only prohibits discrimination between the disabled and non-disabled. Because all Schering employees, whether disabled or not, received equal access to the benefits offered under the LTD Plan, no claim of discrimination under Title III can be stated. App., pp. 23-32. Finally, the Sixth Circuit held that Title I, not Title III, governs alleged discrimination in employment practices. App., pp. 20-23.

REASONS WHY THE PETITION SHOULD BE DENIED

None of the questions Petitioner would have this Court review are in fact appropriate for review under Rule 10 of the Supreme Court Rules. Respondent MetLife will show:

- The question concerning Title III of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. (Petition For a Writ of Certiorari

("Petition") at i, item 2), is simply not presented here. Petitioner mischaracterizes the Sixth Circuit's holding that a group disability benefit plan is not a good offered by a place of public accommodation. Petitioner was not denied access—either physically or in any other way—to any MetLife product. This case, therefore, presents no occasion for this Court to consider whether Title III's regulation of access to places of public accommodation is limited to physical access. Petitioner's request that this Court review the question of whether Title III regulates the content of goods and services offered by places of public accommodaiton is also without merit, since there is no circuit conflict with respect to *Parker's* holding on this issue.

- The question concerning Title I of the ADA (Petition at i, item 1)—whether a totally disabled individual is a "qualified individual with a disability" —has been answered correctly and consistently by the Sixth Circuit in *Parker* and all other circuits which have addressed the issue. There is thus no circuit conflict and this Court can wait to see if one develops before considering this issue. Moreover, since this Court's holding in *Robinson v. Shell Oil Co.* is inapplicable to the Sixth Circuit's Title I holding, there is no reason for the Court to grant discretionary review.

- The question concerning Section 501(c), 42 U.S.C. § 12201(c), of the ADA (Petition at i, item 3) is also not presented by the *Parker* case. Because the Sixth Circuit held that no violation of Titles I and III had occurred, it did not need to address the meaning of the "safe harbor" provision. Therefore, review is not appropriate.

I. The Holding Of The Sixth Circuit That Title III Of The ADA Does Not Prohibit An Employer From Providing To Its Employees A Disability Benefits Plan Containing Different Levels Of Benefits For Disabilities Due To Mental Illnesses And Physical Illnesses Is Consistent With Statutory Language And Not In Conflict With The Holding Of Any Circuit Court; Therefore, There Is No Compelling Reason For Granting Discretionary Review Under Rule 10.

A. *The Question Petitioner Tenders Concerning Whether Title III Pertains Only to Physical Access to Structures Is Not Presented by This Case and Rests on a Mischaracterization of the Sixth Circuit's Holding; Therefore, the Petition Should Be Denied.*

Petitioner, by mischaracterizing the holding of the Sixth Circuit in Parker, has failed to demonstrate a "compelling reason" why this Court should grant discretionary review on a writ of certiorari under Rule 10 of the Supreme Court Rules. Petitioner claims that the crux of the *Parker* court's holding is that, because Petitioner did not physically access her policy from a MetLife insurance office, and since Title III covers only physical places of public accommodation, Petitioner has no claim under Title III. Petition, pp. 9-11. This holding, Petitioner claims, conflicts with *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994), which held that the application of Title III is not limited to physical structures.

What the *Parker* court actually held, however, was that a disability benefit plan provided by a private employer and funded by a group insurance policy not available to the general public is not a good offered by a place of public accommodation. As the Sixth Circuit explained:

> The public cannot enter the office of MetLife or Schering-Plough and obtain the long term disability policy that plaintiff obtained. Parker did not access her policy through MetLife's insurance office. Rather

> she obtained her benefits through her employer. There is, thus, no nexus between the disparity in benefits and the services which MetLife offers to the public from its insurance office.

App., pp. 11-12. In other words, in the context of providing a group insurance policy to Schering to provide disability benefits to its employees, MetLife is a wholesaler engaged in a business-to-business transaction; the product it sold to Schering cannot be accessed by any individual member of the general public at any MetLife "insurance office."

The court noted that its conclusion is supported by the Department of Justice ("DOJ"), the agency charged with enforcement of Title III. The DOJ explained that wholesale establishments which sell goods to other businesses and not to individuals are not considered places of public accommodation.

> For example, a company that grows food produce and supplies its crops exclusively to food processing corporations on a wholesale basis does not become a public accommodation because of these transactions. If this company operates a road side stand where its crops are sold to the public, the road side stand would be a sales establishment covered by the ADA. . . . Of course, a company that operates a place of public accommodation is subject to [Title III] only in the operation of that place of public accommodation. In the example given above, the wholesale produce company that operates a road side stand would be a public accommodation only for the purpose of operation of that stand. The company would be prohibited from discriminating on the basis of disability in the operation of the road side stand, and it would be required to remove barriers to physical access . . . .

28 C.F.R. pt. 36, app. B at 614 (1997); App., pp. 12-13. Thus, the Sixth Circuit correctly concluded: "[T]he offering of disability policies on a discounted basis solely to

a business is not a service or good offered by a place of public accommodation." App., p. 13.

In *Carparts* an employee challenged a lifetime benefit limitation for AIDS-related treatments in a self-funded medical benefit plan. The plan had been provided to the employee's employer through an employer association and its administering trust. The First Circuit held that Title III does not require that places of public accommodation have physical structures for persons to enter. The *Carparts* court was concerned about limiting the means of access to a place of public accommodation. The First Circuit observed: "It would be irrational to conclude that persons who enter an office to purchase a service are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not." 37 F.3d at 19. However, Petitioner's perceived conflict (*see* Petition, pp. 10-11) between *Parker* and *Carparts* over the method of access—whether by physical entry, telephone, mail, etc.—to a place of public accommodation is illusory. The Sixth Circuit specifically commented: "We have expressed no opinion as to whether a plaintiff must physically enter a public accommodation to bring suit under Title III as opposed to merely accessing, by some other means, a service or good provided by public accommodation." App., p. 12, fn. 3. The point is that neither Petitioner nor any member of the general public could access *by any means* the group insurance policy MetLife sold to Schering.

Moreover, *Carparts did not hold* that an organization providing a health benefit plan to the employees of its members is a public accommodation; rather the First Circuit remanded the case to the district court to "allow plaintiffs the opportunity to adduce further evidence supporting their view that the defendants are places of 'public accommodation' within the meaning of Title III of the ADA." *See Carparts,* 37 F.3d at 19. Where the courts

in *Parker* and *Carparts* differed was over whether a "place of public accommodation" must be a physical place. *Carparts* found that such places are not limited to actual physical physical structures (37 F.3d at 19); *Parker* (correctly in Respondent's view) found that the statute requires a physical place (App., pp. 10-11; 17-19). But that conflict is not determinative with respect to the core holding of *Parker* that an employer-provided disability benefit plan is not a good offered by a place of public accommodation. Moreover, the *Carparts* court was careful to cautiously limit its holding: "Beyond our threshold determination, we must tread with care . . . We think that at this stage it is unwise to go beyond the *possibility* that the plaintiff may be able to develop some kind of claim under Title III even though this may be a less promising vehicle in the present case than Title I." 37 F.3d at 19, 20 (emphasis in original).

Additionally, this is not a proper case to consider whether a "place of public accommodation" requires an actual physical structure because the Sixth Circuit also held that, in any case, no disability-based discrimination had occurred since Petitioner had equal access to the same disability benefit plan as all other Schering employees, disabled or not. *See* App., pp. 23-32.

Thus, because of Petitioner's mischaracterization of the *Parker* holding, there is no compelling reason under Rule 10 why this Court should grant discretionary review.

B. *The Sixth Circuit's Holding That Title III Only Covers Access to Goods and Services Offered by a Place of Public Accommodation but Not the Content of Those Goods and Services Is Consistent With Statutory Language and Congressional Intent, and Is Not in Conflict With the Decision of Any Circuit Court; Therefore Review Should Not Be Granted.*

There is no compelling reason for this Court to grant review with respect to the *Parker* court's holding that

Title III is intended to provide people with disabilities with equal *access* to goods and services offered by places of public accommodation, but not intended to regulate the substantive *content* of such goods and services. App., pp. 13-15. Petitioner's attempt to manufacture a conflict between *Parker* and *Carparts* on this holding fails. Although claiming the existence of a conflict, Petitioner is forced to admit that *Carparts "did not reach this issue. . . ."* Petition, p. 12 (emphasis added). As the *Carparts* court itself observed: "In drafting Title III, Congress intended that people with disabilities have *equal access* to the array of goods and services offered by private establishments and made available to those who do not have disabilities. S. Rep. No. 116, 101st Cong., 1st Sess. at 58 (1989)." 37 F.3d at 19 (emphasis added).

Title III's legislative history makes abundantly clear that Congress did not intend to regulate the *content and design* of goods and services (such as insurance policies), but merely *access* to them. Congressional reports revealed the rationale behind Title III's prohibition of discrimination in access to places of public accommodation:

> Based on testimony presented at the hearings and recent national surveys and reports, it is clear that an overwhelming majority of individuals with disabilities lead isolated lives and do not frequent places of public accommodation. . . Several witnesses addressed the obvious question "Why don't people with disabilities frequent places of public accommodation and stores as often as other Americans"? Three major reasons were given by witnesses. The first reason is that people with disabilities do not feel that they are welcome and can participate safely in such places. The second reason is fear and self-consciousness about their disability stemming from degrading experiences they or their friends with disabilities have experienced. The third reason is architectural, communication, and transportation barriers.

H.R. Rep. 485, 101st Cong., 2nd Sess. at 34-35 (1990); S. Rep. No. 116, 101st Cong., 1st Sess. at 11 (1989).

All of the issues mentioned above deal with access; none concerns the substantive content or design of the goods or services available at a place of public accommodation. The clear purpose of Title III was to eliminate barriers to access for disabled people in obtaining goods and services from places of public accommodation, not to require that all goods and services be redesigned for use by every category of disabled persons.[4] This is further demonstrated by the regulations promulgated under Title III which instruct that:

> This part does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitated by, individuals with disabilities.

28 C.F.R. § 36.307(a). As the *Parker* court points out (App., pp. 13-14), the DOJ has further explained:

> The purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided. In other words, a bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Braille or large print books. Similarly, a video store must make its facilities and rental operations accessible, but is not required to stock close-captioned video tapes.

28 C.F.R. pt. 36, App. B at 640 (1997).

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[4] The First Circuit in *Carparts similarly* observed:

> One who simply reads the Committee Report describing the operaiton of Title III could easily come away with the impression that it is primarily concerned with access in the sense of either physical access to a place of public accommodation or something analogous, such as access provided through telephone lines, messengers or some other medium.

37 F.3d at 19-20.

Thus, it is clear that the Congressional purpose embodied in Title III was to offer disabled persons equal access to goods and services through the removal of barriers to such access and prohibition of refusals to deal with disabled individuals, but does not encompass or envision regulation of the content and design of the goods and services offered by places of public accommodation. Moreover, because no circuit court has disagreed with the Sixth Circuit's holding in *Parker* in this regard, there is no conflict between the circuits warranting a grant of discretionary review.

An examination of the district court cases upon which Petitioner relies to support her request for review (Petition, p. 14) reveals that the majority are *access* cases involving denials of personal insurance policies to disabled persons by retail insurance offices.[5] They are readily distinguishable from *Parker* in that they do not involve group policies (which are unavailable to the general public) or employee benefit plans; nor are they concerned with the content of insurance policies. Thus, these district court cases offer no support for review of *Parker* by this Court. In any event, they are district court cases; no circuit conflict is presented.

Remarkably, Petitioner argues that the exemption from coverage given to insurers and benefit plans under Section 501(c), 42 U.S.C. § 12201(c) (the "safe harbor" provision),[6] supports her contention that the content and

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[5] *See, e.g., Doukas v. Metropolitan Life Ins. Co.*, 950 F. Supp. 422 (D.N. H. 1996) (Title III claim stated with respect to denial of application for personal mortgage disability insurance policy from retail insurance agency); *Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316 (C.D. Cal. 1996) (denial of application for individual life insurance policy); *Baker v. Hartford Life Ins. Co.*, 1995 U.S. Dist. LEXIS 14103 (N.D. Ill. 1995) (same); *Cloutier v. Prudential Ins. Co. of Am.*, 964 F. Supp. 299 (N.D. Cal. 1997) (same).

[6] Section 501(c) provides:

> Subchapters I through III of this chapter and Title IV of this Act shall not be construed to prohibit or restrict—

design of insurance products and employee benefit plans are regulated by the ADA. *See* Petition, pp. 12-14. This mysterious sleight-of-hand by which an exemption from statutory coverage is transformed into a broad expansion of coverage is contrary to the clear Congressional intent not to disrupt "the way the insurance industry does business in accordance with State laws and regulations. . . ." S. Rep. No. 116, 101st Cong., 1st Sess. at 84 (1989).

Indeed, far from evidencing an intent to regulate the content of insurance products, the ADA does the opposite. Its "safe harbor" provision states that the statute is *not* intended to supersede State insurance laws, which, pursuant to the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, occupy the field in this area. Had Congress intended that the ADA regulate something as significant as the content of insurance policies, it would undoubtedly have done so explicitly. As Judge Brieant declared in *Leonard F. v. Israel Discount Bank*, 967 F. Supp. 802, 805 (S.D. N.Y. 1997).[7]:

> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks or administering such risks that are based on or not inconsistent with State law; or
>
> (2) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.
>
> Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapters I and III.

42 U.S.C. § 12201(c).

[7] In *Leonard F.* the district court dismissed a Title III claim against MetLife with respect to its issuance of a group disability

> Congress meant to protect providers [of] insurance and their practice of providing different levels of benefits for individuals with physical and mental conditions (as a risk classification practice). The ADA does not, nor was it ever intended to regulate the business of insurance, and for that reason it includes an explicit "Safe Harbor" provision shielding traditional insurance risk classification practices from regulation under the ADA.

Neither *Carparts* nor any other circuit court has held that the content and design of insurance policies and employee benefit plans are regulated by Title III of the ADA. Indeed, two circuits have reached the conclusion that the term " subterfuge" in Section 501(c) does not expand the scope of the ADA to regulate the substantive terms of benefit plans and insurance policies. *See Modderno v. King*, 82 F.3d 1059, 1065 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 772 (1997); *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674, 678-79 (8th Cir. 1996). Thus, in the absence of a circuit conflict this issue is not ripe for review by this Court and the Petition should be denied.[8]

Likewise, the Sixth Circuit's refusal to defer to the DOJ's view in its non-authoritative Technical Assistance Manual that insurance policy contents are regulated by

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policy to an employer to fund an employee benefit plan which contained a two-year limitation of benefits provision for disabilities caused by mental illnesses.

[8] The Court should be aware that there is another case involving the same ADA Title I and Title III issues as *Parker*—and indeed the same defendants—now before the Third Circuit: *Ford v. Schering-Plough Corp., et al.*, no. 96-5674, *on appeal from* no. 96-1991 (D. N.J. Sept. 12, 1996). The district court in *Ford* dismissed plaintiff's ADA claims for the same reasons as the *Parker* court. Briefing in *Ford* has been completed; oral argument has been set for January 26, 1998.

the ADA[9] does not present a compelling reason for granting review. Contrary to Petitioner's contention (*see* Petition, pp. 15-18), the Manual's statement that Title III regulates the "terms and conditions of insurance contracts" is clearly inconsistent with the DOJ's own regulation that Title III does not require a public accommodation to "alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities." 28 C.F.R. § 36.307(a). Under the Manual's interpretation, insurance products are the *only* goods and services whose content and design are so regulated by Title III, despite the safe harbor provisions expressly exempting insurance practices from such regulation! Thus, the Sixth Circuit properly declared: "As this interpretation is inconsistent with [the DOJ's] regulations and the statutory text of Tile IV, we decline to adopt it." App., pp 14-15 fn. 5. When an agency interpretation is so clearly at odds with the plain meaning of the statute, it need not be given deference. *See Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171; *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Therefore, there is no compelling reason for this Court to grant discretionary review because the Sixth Circuit properly declined to follow an unauthoritative and inconsistent agency interpretation.

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[9] In its Technical Assistance Manual, § III-3.11000, *reprinted in* Americans With Disabilities Act Manual (BNA) at 90:917, the DOJ stated:

> Insurance offices are places of public accommodation and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts they offer. Because of the nature of the insurance business, however, consideration of disability in the sale of insurance contracts does not always constitute "discrimination." An insurer or other public accommodation may underwrite, classify or administer risks that are based on or not inconsistent with State law, provided that such practices are not used to evade the purposes of the ADA.

C. *The Sixth Circuit's Holding That the ADA Only Prohibits Discrimination Between the Disabled and Non-Disabled, and Petitioner Had Equal Access to the Same Benefits Plan as All Schering Employees Whether Disabled or Not, Is Consistent With Statutory Language and Decisional Law; Therefore Review Is Not Warranted.*

Petitioner further claims that the Sixth Circuit erred in its holding, which provides an additional basis for affirming the dismissal of her Title III claim, that the ADA only prohibits discrimination between the disabled and the non-disabled. Petition, pp. 28-29. Petitioner's bare assertion of error is not a compelling reason for this Court to grant review. Petitioner does not cite *any case*, much less a circuit court case, which supports her position. Indeed, the decisions of this Court and other courts are consistent in holding that the ADA (and its predecessor the Rehabilitation Act) does not mandate equality of benefits between individuals with different disabilities. Because Petitioner was afforded equal access to the same benefit plan as all other Schering employees, whether disabled or non-disabled, there is simply no basis for a claim of discrimination.

The Sixth Circuit in *Parker* held:

> The disparity in benefits provided in the policy at issue is also not prohibited by the ADA because the ADA does not mandate equality between individuals with different disabilities. Rather, the ADA prohibits discrimination between the disabled and the non-disabled; specifically, the ADA mandates that the owners, lessors, and operators of public accommodations provide equal access to the disabled and non-disabled. Because all employees at Schering-Plough, whether disabled or not, received the same access to the long-term disability plan, neither the defendants nor the plan discriminated between the disabled and the able-bodied.

App., p. 23. The Sixth Circuit relied, in part, upon this Court's holding in *Traynor v. Turnage,* 485 U.S. 535

(1988), that the Veteran's Administration did not violate the Rehabilitation Act of 1973, 29 U.S.C. § 794,[10] by denying extensions of educational benefits to veterans whose disabilities were attributed to their "willful misconduct." This Court explained: "There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." 485 U.S. at 549. *See also Alexander v. Choate*, 469 U.S. 287 (1985) (Tennessee's reduction of the number of inpatient days for which Medicaid would pay, which had disproportionate effect on disabled individuals because of their greater medical needs, did not violate the Rehabilitation Act, which "does not . . . guarantee the handicapped equal results from the provision of state Medicaid . . .").

Applying *Traynor* and *Alexander*, the D.C. Circuit recently held that a health benefit plan for federal employees did not violate the Rehabilitation Act by providing different levels of coverage for mental and physical illnesses. *Modderno*, 82 F.3d 1059 (D.C. Cir. 1996). The D.C. Circuit concluded that such disparity was not the "sort of harm which the Rehabilitation Act was intended to address." 82 F.3d at 1061. In a concurring opinion, Judge D. Ginsburg explained: "As long as the Foreign Service Benefit Plan offers the same coverage to all insureds, regardless of the disability, it cannot be said to discriminate on the basis of disability." 82 F.2d at 1066.

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[10] The Rehabilitation Act, as amended, provides that:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a). The ADA provides that its provisions be interpreted in a way that "prevents imposition of inconsistent or conflicting standards for the same requirements under this title and the Rehabilitation Act of 1973." 42 U.S.C. § 12117(b).

Similarly, the Seventh Circuit in *Equal Employment Opportunity Commission v. CNA Ins. Co.*, 96 F.3d 1039 (7th Cir. 1996), held that a two-year limitation of benefits provision for mental illness in a long term disability plan (the same provision at issue in *Parker*) did not violate the ADA. The Seventh Circuit stated:

> [The employer] did not charge higher prices to disabled people, on the theory that they might require more in benefits. Nor did it vary the terms of its plan depending on whether or not the employee was disabled. All employees—the perfectly healthy, the physically disabled, and the mentally disabled—had a plan that promised them long term benefits from the onset of disability until age 65 if their problem was physical, and long term benefits for two years if the problem was mental or nervous. This may or may not be an enlightened way to do things, but it was not discriminatory in the usual sense of the term.

96 F.3d at 1044 (citations omitted).

The Eighth Circuit reached a similar conclusion in *Krauel*, 95 F.3d 674 (8th Cir. 1996), finding that an employee benelt plan which excluded medical coverage for treatment of infertility that was equally applied to all participants did not violate the ADA. Citing the EEOC's "Interim Enforcement Guidance on Application of the ADA to Health Insurance," the court held that "[i]nsurance distinctions that apply equally to all insured employees, that is to individuals with disabilities and to those who are not disabled, do not discriminate on the basis of disability." 95 F.3d at 678.

The ADA's legislative history provides further support that a benefit plan may limit the amount and type of coverage provided, as long as individuals with disabilities receive the same *access* to whatever coverage is provided to individuals without disabilities. Thus, the House Judiciary Committte report stated: "[W]hile it is permissible for an employer to offer insurance policies that limit

coverage for certain procedures or treatments, coverage cannot be denied entirely to a person with disability." H.R. Rep. No. 485, 101st Cong 2d Sess., pt. 3 at 71 (1990). The House Labor Committee report explained: "All people with disabilities must have equal access to the health insurance coverage that is provided by the employer to all employees." H.R. Rep. No. 485, 101st Cong., 2nd Sess., pt. 2 at 59 (1990). Since Petitioner received access to the same package of disability benefits offered to all other Schering Plan participants, disabled or non-disabled, the *Parker* court correctly concluded that no ADA violation had occurred. Because all circuit courts that have addressed this issue have reached the same conclusion, there is no reason for this Court to grant discretionary review.

Furthermore, the recent passage of the Mental Health Parity Act of 1996 ("MHPA"), 29 U.S.C. § 1185(a), demonstrates that partity in benefits for mental and physical illnesses is not mandated by the ADA. The MHPA requires parity for mental and physical conditions in annual and lifetime benefits limits in health insurance plans. (The MHPA expressly does not apply to disability benefit plans or policies.) As the *Parker* court observed, the passage of MHPA demonstrates that "Congress believed the ADA neither governs the content of insurance policies nor requires parity between physical and mental illnesses; thus, passage of a law requiring such parity was required if Congress desired insurance carriers to cease including disparate mental and physical health benefits in insurance policies." App., p. 29. Significantly, Petitioner does not discuss this rationale for the *Parker* court's holding that the ADA does not prohibit a disparity in benefits between mental and physical conditions in long-term disability benefit plans. Thus, there is no reason for this Court to grant Petitioner's request for review.

D. *The Sixth Circuit's Holding That Allegations of Discrimination in Employment Practices Are Governed Exclusively by Title I Is Unchallenged by Petitioner; Therefore Review Is Not Appropriate.*

Another basis for the Sixth Circuit's decision in *Parker* is that Title III does not govern allegations of discrimination in employment practices. *See* App., pp. 20-23. Legislative history makes clear that any claim of discrimination in employee benefits is covered by Title I of the ADA. *See, e.g.*, S. Rep. No. 116, 101st Cong., 1st Sess. at 58 (1989) ("Title III is not intended to govern any terms or conditions of employment by providers of public accommodations . . . employment practices are governed by Title I of this legislation"). *See also Motzkin v. Trustees of Boston University*, 938 F. Supp. 983, 996 (D. Mass. 1996) ("The legislative intent is so clear from the language of Titles I and III that one need not go beyond that language to conclude that employment discrimination is the exclusive province of Title I.") It would clearly be incongruous to permit an employee challenging the design of her employer's benefit plan to bring a Title III claim against the insurer underwriting the benefits, yet insulate the employer which sponsored and maintains the plan from a Title III claim. In any case, Petitioner has not addressed this holding; therefore there is no reason for this Court to grant review.

II. There Is No Compelling Reason To Grant Discretionary Review Of The Sixth Circuit's Affirmance Of The Dismissal Of Petitioner's Title I Claim Because She Is Not A "Qualified Individual With A Disability" Since All Circuit Courts Addressing The Issue Have Reached The Identical Conclusion And This Court's Holding In *Robinson v. Shell Oil Co.* Is Not Applicable.

A. *Because There Is No Circuit Conflict With Respect to* Parker's *Holding That a Totally Disabled Individual Is Not a "Qualified Individual With a Disability," This Issue Is Not Worthy of Review.*

There is no compelling reason for this Court to grant discretionary review of the Sixth Circuit's affirmance of the

dismissal of Petitioner's Title I claim. All three decisions in *Parker*—the district court's, the appellate panel's and the *en banc* court's—uniformly hold that, under the clear language of the statute, Petitioner cannot state a claim under Title I. Furthermore, all U.S. courts of appeals which have addressed the issue have reached the identical conclusion that a totally disabled individual is not a "qualified individual with disability" and therefore lacks standing to sue under Title I of the ADA. Therefore, in the absence of any conflict or inconsistency between *Parker*'s Title I holding and the plain meaning of the statute and the decisions of this Court or any circuit court, Petitioner's request for review should be denied.

Title I of the ADA prohibits discrimination in employment "against a qualified individual with a disability because of that disability . . . ." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, *can perform the essential functions of the employment position* that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added). As numerous circuit courts have held, the meaning of "qualified individual with a disability is clear: the protections of Title I are extended only to individuals with disabilities who can work at their jobs. Individuals who are unable to work are not protected. *See, e.g., McNemar v. The Disney Store, Inc.*, 91 F.3d 610, 618 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997) (" a person unable to work is not intended to be, and is not, covered by [Title I of] the ADA"); *Tyndall v. National Educ. Centers*, 31 F.3d 209, 212 (4th Cir. 1994) ("under the ADA, only persons who are 'qualified' for the job in question may state a claim for discrimination"); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996) (totally disabled person could not bring ADA Title I claim); *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995) (employee who could not perform essential functions of the job with accom-

modation was not "qualified" within meaning of the ADA).

The district court in *Parker* similarly stated: "[T]he plain language of the Act clearly indicates that the ADA was designed to afford relief only to those individuals with disabilities who can perform the essential functions of the job they hold or seek." App., p. 79. Therefore, because Petitioner was admittedly totally disabled from performing any job when the alleged discrimination occurred (i.e., when her disability benefits were terminated), the district court correctly held that she was not a "qualified individual with a disability" and could not state a Title I claim. App., pp. 76-81. The appellate panel of the Sixth Circuit affirmed the district court's dismissal of the Title I claim, rejecting Petitioner's and the EEOC's argument that Petitioner qualified for the "employment position" of "benfits recipient" as "creative thinking" and "a convoluted construction of the statutory language, which coflicts with the plain meaning of the words." App., p. 51. The *en banc* court reaffirmed the district court's dismissal of the Title I claim without discussion, noting that Petitioner "did not seek rehearing on the disposition of her Title I claim." App., p. 5, fn. 2.

Petitioner now asserts that the Title I holding is ripe for review by this Court. Contrary to Petitioner's assertion that *Parker*'s Title I holding is a case of "first impression" (Petition, p. 20), however, other circuit courts which have addressed the Title I standing issue in cases involving claims of discrimination in provision of fringe benefits have uniformly applied the clear statutory language in precisely the same way as did the Sixth Circuit.

For example, in *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039 (7th Cir. 1996), the Seventh Circuit reached the same conclusion in a case essentially identical to *Parker*. In *CNA*, a CNA employee was covered under a long term disability plan which, like the plan in *Parker*, limited

benefits for mental and nervous disorders to two years. The employee became totally disabled due to severe depression and began receiving LTD benefits. Claiming that the difference in the length of time disability benefits were payable to individuals with physical disorders as opposed to those with mental disorders violated the ADA, the employee filed a complaint with the EEOC, and the EEOC sued to enjoin CNA from terminating her LTD benefits. After the district court granted CNA's motion for summary judgment,[11] the Seventh Circuit affirmed, holding that the totally disabled employee was not "qualified individual with a disability" and therefore could not state a claim under Title I.2 96 F.3d at 143, 1045. The court rejected the EEOC'c "strained" interpretation that the employee's "employment position" was "disability benefits recipient," because "[a]n 'employment position' is a job." 96 F.3d at 1044.

In *Gonzales v. Garner Food Services*, 89 F.3d 1523 (11th Cir. 1996), *cert. denied*, 65 USLW 3766 (May 19, 1997), the Eleventh Circuit similarly rejected the "qualified benefit recipient" theory, specifically rebuffing the EEOC's attempt to "shoehorn" a totally disabled individual into the statutory definition. 89 F.3d at 1529.

Similarly, in *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768 (8th Cir. 1987), *cert. denied*, 485 U.S. 938 (1988), the Eighth Circuit hald that a totally disabled employee was not an "otherwise qualified handicapped individual" and thus could not state a claim under the Rehabilitation Act for discrimination in the provision of

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[11] The district court held, *inter alia*: "Because it is undisputed that [the employee] is a totally disabled individual who can no longer perform any job for which she is qualified, [she] does not meet the definition of a 'qualified individual with a disability.' The court, therefore, holds that [she] does not have standing to bring a claim under Title I of the ADA." *EEOC v. CNA Ins. Cos.*, 95 C 5835, 5 A.D. Cases 1763, 1996 WL 26879 *5 (January 23, 1996 N.D. Ill.).

fringe benefits. The Eighth Circuit found that the Rehabilitation Act was intended to prohibit discrimination only against an employee who is able to perform his job. The court concluded:

> [B]oth the language of the statute and its interpretation by the Supreme Court [in *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979)] indicate that section 504 was designed to prohibit discrimination within the ambit of the employment relationship in which the employee is potentially able to do the job in question. Though it may seem undesirable to discriminate against a handicapped employee who is no longer able to do his or her job, *this sort of discrimination is simply not within the protection of § 504.*

831 F.2d at 771 (emphasis added). Therefore, the court denied the employee's claim with respect to fringe benefits, because, by her own admission, she was unable to perform her job. *Id.* at 771.

Petitioner's attempt to distinguish *Beauford* is unavailing. *See* Petition, pp. 21-22. That the Rehabilitation Act lacks the insurance "safe harbor" provision in the ADA has nothing whatsoever to do with the court's application of that statute's "otherwise qualified handicapped individual" requirement.

Petitioner argues that the language of Title I must be viewed expansively "in the context of the ADA's broader meaning and purpose" to improve the lot of disabled individuals. Petition, pp. 24-25. However, the duty of the judiciary is to apply the statute as written by Congress. Under statutory construction principles, the rule is firmly esablished that "the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute meaning . . . is finished." *Cowart v. Niklos Drilling Co.*, 505

U.S. 469, 475 (1992) (citation omitted). Accordingly, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration." *Mertens v. Hewitt Associates,* 508 U.S. 248, 261 (1993) (citation omitted). As the appellate panel in *Parker* remarked, it is not for the courts to alter or enhance the plain meaning of Congressional enactments. If, as Petitioner believes, Congress left a gap in the ADA's coverage relative to her particular situation, it is for Congress, not the courts, to mend that gap. *See* App., p. 51.

Moreover, the evidence indicates that Congress's limitation of Title I protection to persons who can work was purposeful. Congress could have drafted a broader definition of a "qualified individual with a disability" as it did in Title II of the ADA. In contrast to the Title I definition, in Title II Congress defined "qualified individual with a disability" as:

> an individual with a disability who, with or without reasonable modification to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2). Clearly, Congress knew how to define "qualified individual with a disability" more broadly when it chose to do so. Unquestionably, it did not do so in Title I, but rather chose to limit the protection afforded under Title I to disabled individuals who can work.

Since the circuit courts are in agreement with *Parker's* Title I holding, there is no compelling reason to grant discretionary review. The Court should wait until an actual circuit conflict presents itself, if ever, before considering review of this issue. Presently, at least one case involving the same Title I issue is at the appellate level: *Ford v. Schering-Plough Corp., et al.*, No. 96-5674 (3rd Cir.) which has been fully briefed and is awaiting oral argument. Several district court cases involving the same

Title I issue are currently pending: *Leonard F. v. Israel Discount Bank*, 95 CIV 6964 (CLB) (S.D. N.Y.); *Lewis v. Aetna Life Ins. Co.*, No. CIV A.97-1230-A (E.D. Va.); *EEOC v. Chase Bank*, No. 97 CIV 6620 (S.D. N.Y.); and *EEOC v. Staten Island Savings Bank*, No. CV 97-5142 (E.D. N.Y.). When, and if, appellate decisions in these or other cases result in a conflict with *Parker*, then consideration of review by this Court may be appropriate.

B. *Because the Civil Rights Act Title VII Holding in* Robinson *Is Inapplicable to the ADA Title I Holding in* Parker, *Petitioner's Request for Review Should Be Denied.*

This Court should also reject Petitioner's argument that the Sixth Circuit's ADA Title I holding in *Parker* is inconsistent with this Court's holding in *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997), that former employees are protected against retaliatory discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* In *Robinson*, the Court found that the term "employee" in § 704(a), 42 U.S.C. § 2000e-3(a), was ambiguous, and therefore concluded that, consistent with the broader context of Title VII, former employees are protected from retaliation for filing a discrimination complaint. 117 S. Ct. at 848.

The Court's decision in *Robinson*, however, has no relevance to the ADA Title I holding in *Parker* that Petitioner was not a "qualified individual with a disability." Whether Petitioner was a former employee is irrelevant to the *Parker* holding. Unlike Title VII of the Civil Rights Act, Title I of the ADA contains a threshold requirement that a plaintiff be "qualified," i.e., able to perform the essential functions of the job. 42 U.S.C. § 12111(8); § 12112. Absent such a showing, there is no ADA protection. Because the statutory language here is not ambiguous (*see* cases so holding, *supra* at pp. 20-22), there is no need for further inquiry.

Furthermore, in *Robinson* the Court placed considerable emphasis on the fact that Title VII's definition of employee lacked "any temporal qualifier and is consistent with either current or past employment." 117 S. Ct. at 846. In contrast, Title I of the ADA does contain a significant temporal qualifier: a "qualified individual with a disability" must be able to perform the "essential functions of the employment position that such individual *holds or desires.*" 42 U.S.C. § 12111(8) (emphasis added). One only "holds" a job in the present or "desires" a position for the future; neither word can be used to refer to the past. Thus, having been able at some time in the past to perform the essential functions of a job is plainly not sufficient to qualify for protection under Title I.

The precise argument made by Petitioner was rejected by the Seventh Circuit in *EEOC v. CNA*. There, in a circuit that already recognized protection for former employees under Title VII's retaliation provision, the EEOC sought to bootstrap such protection to create standing for a totally disabled former employee under Title I of the ADA. Rejecting the agency's argument, the Seventh Circuit concluded that the status of the complainant as a former employee did not confer ADA protection. 96 F.3d at 1044-45.

Therefore, because *Robinson* is inapplicable to the *Parker* holding, there is no reason to grant discretionary review.

III. Because The Meaning And Application Of Section 501(c) Of The ADA Was Not Addressed By The En Banc Sixth Circuit In *Parker*, There Is No Compelling Reason For Granting Discretionary Review.

The Court should reject Petitioner's assertion that the meaning of the ADA's "safe harbor" provision, Section 501(c), 42 U.S.C. § 12201(c), is ripe for review. *See* Petition, p. i. Decidedly it is not, since the *Parker* court expressly did not reach the issue of interpretation of Section 501(c). The Sixth Circuit remarked:

> We leave the resolution of the proper definition of subterfuge in Title IV for another day because we conclude that a long-term disability plan provided by an employer is not covered by Title III; the safe harbor provision is, therefore, not implicated.

App., pp. 16-17, fn. 7.

Similarly, the First Circuit in *Carparts* did not decide whether or how to apply Section 501(c). In *dicta*, the First Circuit speculated about the application of Section 501(c) to insurance,[12] noting:

> [T]here is some indication in the legislative history that the [insurance] industry received this exemption not because its policies would otherwise be substantively regulated under Title III, but because "there is some uncertainty over the possible interpretations of the language contained in Titles I, II and III as it applies to insurance . . . ." *See* S. Rep. No. 116, 101 Cong., 1st Sess. at 84 (1989).

Thus, because the issue of the meaning and application of Section 501(c) was not decided in *Parker*, it is not ripe for review and the Petition should therefore be denied.

CONCLUSION

Because the questions Petitioner raises do not present a compelling reason for review, the Petition should be denied.

Respectfully submitted,

Of Counsel
RONALD S. RAUCHBERG
STEVEN C. KRANE
PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036
(212) 969-3490

ALLAN M. MARCUS
Counsel of Record
AMY K. POSNER
One Madison Avenue
New York, New York 10010
(212) 578-3722
Counsel for Respondent Metropolitan Life Insurance Company

December 16, 1997

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[12] Notably, there was no insurance policy at issue in *Carparts*: the benefits plan was self-funded. 37 F.3d at 14.

APPENDIX

APPENDIX

APPENDIX

RULE 29.6 STATEMENT

Respondent Metropolitan Life Insurance Company has no parent company, but has the following affiliates and subsidiaries, other than wholly-owned subsidiaries:

AEW Advisors, Inc.
AEW Capital Management, Inc.
AEW Capital Management, L.P.
AEW Hotel Investment Corporation
AEW Hotel Investment Limited Partnership
AEW Investment Group, Inc.
AEW Real Estate Advisors, Inc.
AEW Real Estate Advisors, Limited Partnership
AEW Securities, L.P.
Afore Genesis S.A. de C.V.
Aldrich Eastmen Global Investment Strategies, LLC.
Aurora Limited Partnership
Back Bay Advisors, Inc.
Back Bay Advisors, L.P.
BBC Investment Advisors, Inc.
BBC Investment Advisors, L.P.
BCOP Associates, L.P.
Blodgett Holdings, Inc.
Briggs Holdings, Inc.
Briggs Plumbing Products, Inc.
Capital Growth Management Limited Partnership
Chart House Enterprises, Inc.
Cloverleaf Properties, Inc.
Coating Technologies International, Inc.
Copley Management Advisors, L.P.
Copley Properties Company, Inc.
Copley Properties Company II, Inc.
Copley Pro perties Company III, Inc.
Copley Public Partners Holding, L.P.
Copley Securities Corporation
Copley/Orchard Investors, Inc.

Copley/Orchard Investors, L.P.
CREA Investors/Santa Fe Springs, Inc.
CREA Western Investors I, Inc.
CREA Western Investors I, L.P.
CTR Corp.
Dan River, Inc.
Eclipse Claim Services, Inc.
Eighth Copley Corp.
Fifth Copley Corp.
Fifth Singleton Corp.
First Income Corp.
Fourth Copley Corp.
Fourth Income Corp.
Fourth Singleton Corp.
Frialator International, Limited
Genesis Seguros Generales, Sociedad Anonima de Seguros y Reaseguros
Graystone Partners, Inc.
Graystone Partners, L.P.
GS Blodgett Corporation
GS Blodgett International, Ltd.
HACO Corp.
Harris Associates, Inc.
Harris Associates, L.P.
Harris Associates Securities, L.P.
Harris Partners, Inc.
Harris Partners, L.L.C.
Interbroker, Correduria de Reaseguros, S.A.
Jurika & Voyles, Inc.
Jurika & Voyles, L.P.
Kolon-Met Life Insurance Company
Lone Star Industries, Inc.
Loomis, Sayles & Company, Inc.
Loomis, Sayles & Company, L.P.
Luther's Bar-B-Q', Inc.
Magikitch'n, Inc.
MC Management, Inc.
MC Management, L.P.

Mecca Software, L.L.C.
Mercadian Capital, L.P.
Mercadian Funding, L.P.
Met Life International Real Estate Equity Shares, Inc.
Metric Colorado, Inc.
Metric Institutional Apartment Fund II, L.P.
Metropolitan Lloyds Insurance Company of Texas
Metropolitan Structures
Morguard Investments Limited
Nailite International, Inc.
NEF Corporation
NEIC Holdings, Inc.
New England Funds, L.P.
New England Funds Management, L.P.
New England Investment Associates, Inc.
New England Investment Companies, L.P.
Origenes AFJP S.A.
Perseus Partners, L.P.
Pesco Plus, L.C.
Pitco Frialator, Inc.
Pleiades Partners, L.P.
Public Employees Equities Services Company
R&T Asset Management, Inc.
Reich & Tang Asset Management, Inc.
Reich & Tang Asset Management, L.P.
Reich & Tang Distributors, L.P.
Reich & Tang Services, L.P.
Santander, Met, S.A.
Second Income Corp.
Seventh Copley Corp.
Sixth Copley Corp.
Sixth Singleton Corp.
Seguros Genesis, S.A. (Mexico)
Seguros Genesis, S.A. (Spain
SPA Partners, L.P.
State Street Research Intermediate Bond Fund
State Street Research International Fixed Income Fund
State Street Research Strategic Portfolios: Aggressive

State Street Research Strategic Portfolios: Conservative
State Street Research Strategic Portfolios: Moderate
Stellar Partners, L.P.
Third Income Corporation
Third Singleton Corporation
Vaughn, Nelson, Scarborough & McConnell, L.P.
VNSM, Inc.
West peak Investment Advisors, Inc.
West peak Investment Advisors, L.P.
Chart House Enterprises, Inc.
Lone Star Industries, Inc.
New England Investment Companies, L.P.

Supreme Court, U.S.
FILED
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No. 97-747

In The

Supreme Court of the United States

October Term, 1997

OUIDA SUE PARKER,

Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, SCHERING-PLOUGH CORPORATION and SCHERING-PLOUGH HEALTH CARE PRODUCTS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS SCHERING-PLOUGH CORPORATION AND SCHERING-PLOUGH HEALTH CARE PRODUCTS, INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

FREDERICK J. LEWIS
Counsel of Record
NICOLE MARIE WALTHOUR
McKNIGHT HUDSON LEWIS/
FORD & HARRISON, LLP
6750 Poplar Avenue
Memphis, Tennessee 38138
901/756-1550

Attorneys for Respondents Schering-Plough Corporation and Schering-Plough Health Care Products, Inc.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does a totally disabled individual have standing to sue under Title I of the Americans with Disabilities Act, which is intended to protect only "qualified individuals with a disability" who are able to "perform the essential functions of a job"?

2. Does Title III of the Americans with Disabilities Act, which governs equal access to places of public accommodations for the disabled, regulate the content of the goods and services provided by places of public accommodations and thereby require that employers who offer their employees long term disability benefits provide the same benefits for physical and mental disorders?

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The parties to the proceeding are listed in the Petition at ii. Respondent Schering-Plough Health Care Products, Inc. is a wholly-owned subsidiary of Schering-Plough Corporation. There are no other parent company or non-wholly owned subsidiaries of Respondents Schering-Plough Corporation and Schering-Plough Health Care Products, Inc.

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For the Court's convenience, citations to the *en banc* and panel opinion in this opposition brief will be to the page numbers of the opinions attached to the Petition as Appendix A.

INTRODUCTION

Petitioner Ouida Sue Parker petitions this Court to rewrite the Americans with Disabilities Act (the "ADA") by expanding its coverage to those who cannot perform the essential functions of any job, even with reasonable accommodation. The Petitioner further seeks to have this Court mandate that employers and insurers provide equal benefits for mental and physical disabilities, in spite of the fact that the ADA plainly contains no such requirement and Congress never intended such a result. Finally, Petitioner would have this Court eliminate any distinction between Title I and Title III of the ADA by applying the provisions of Title III of the ADA to employers in contravention of the clear Congressional intent.

The Petition presents no issues that warrant immediate review by this Court. The decision of the Sixth Circuit properly rejected Petitioner's invitation to expand the scope of Title I and Title III of the ADA beyond the plain meaning of the statute and the clear intent of Congress. Moreover, the Petition does not advance a significant conflict between decisions of circuit courts. Finally, as the Sixth Circuit noted in its decision *en banc*, Congress has recently passed the Mental Health Parity Act, 42 U.S.C.

§ 300gg-5, which suggests that Congress did not regard the ADA as a mechanism to regulate the content of insurance policies or to mandate parity of benefits in such policies. Health care reform remains an issue of national concern. The Court should not grant certiorari to resolve a policy issue with implications for employers and insurance companies that are uncertain and potentially far-reaching.

STATEMENT OF THE CASE

Petitioner is totally disabled by a major depression and is unable to perform the essential functions of any job. By virtue of her employment with Respondent Schering-Plough Health Care Products, Inc., Petitioner was a participant in a long-term disability plan (the "Plan") that was written and issued by Respondent Metropolitan Life Insurance Company ("MetLife") to her employer. The Plan provided twenty-four months of long-term disability benefits for mental or nervous disorders. For other disorders, the Plan provided continuous disability payments until age 65. App. at 75.

In accordance with the terms of the employer-sponsored plan, Petitioner received long-term disability benefits for twenty-four months. After the benefits terminated in accordance with the Plan, Petitioner brought suit against the Schering-Plough Respondents and Respondent MetLife. Petitioner seeks this Court's review of her claim that the terms of the Plan violate the Americans with Disabilities Act (the "ADA") because of the disparity in the benefits provided for physical and mental conditions.

The district court held that Petitioner lacked standing to maintain claims against the Respondents under Title I of the ADA because she was not a "qualified individual with a disability" who could perform the essential functions of her job. App. at 80-81. The district court also dismissed Petitioner's Title III claims against the Schering-Plough Respondents on the ground that Title III does not govern employment practices. In doing so, the district court referred to the legislative history of Title III which states that "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by Title I of this legislation." App. at 84. As to both the Schering-Plough Respondents and MetLife, the district court also held that Title III of the ADA prohibits discrimination on the basis of disability only with respect to an individual's ability to make physical use of goods, services, facilities, privileges, advantages or accommodations of places of public accommodation. App. at 83-84.

Petitioner appealed to the Sixth Circuit. On October 25, 1996, a panel of the Sixth Circuit affirmed the district court's ruling that Petitioner lacked standing to maintain an action under Title I of the ADA against the Respondents because she was not a "qualified individual with a disability." App. at 51. The Sixth Circuit panel, however, reversed the district court's ruling with regard to the Title III issue. App. at 69-70.

Respondents Schering-Plough and MetLife filed petitions for rehearing *en banc* solely with regard to the panel's rulings on Title III. Petitioner opposed the petitions for rehearing but did not request rehearing on any

other issue. App. at 7. Thus, Petitioner's claims under Title I of the ADA were not before the *en banc* court and accordingly, the *en banc* court did not address the Title I issues. App. at 5.

The Sixth Circuit *en banc* ruled that a long-term disability plan obtained through an employer is not a public accommodation. The *en banc* court found that the plain words of the statute limit Title III's reach to the provision of unequal or separate benefits by places of public accommodation. Because the benefits challenged by Petitioner were provided to her by virtue of her employment and not at a place of public accommodation, the court reasoned that the benefit plan she received from her employer was not a good or service offered by a place of public accommodation. App. at 13-16. The *en banc* court further ruled that Title III does not govern the content of a long-term disability plan offered by an employer because Title III regulates availability of the goods and services offered by a place of public accommodation and does not govern content. App. at 13. Moreover, the *en banc* court ruled that Title IV does not address the contents of a long-term disability plan offered by an employer because the employer is not a place of public accommodation. App. at 15-17. Finally, the *en banc* court ruled that Title III does not govern the terms and conditions of the employment relationship. App. at 20-22.

Petitioner filed for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT CORRECTLY DETERMINED THAT PETITIONER COULD NOT MAINTAIN AN ACTION UNDER TITLE I.

A. Petitioner Is Not a Qualified Individual With a Disability.

The Sixth Circuit panel decision properly found that Petitioner lacked standing to pursue claims against the Schering-Plough Respondents under Title I because she is not a "qualified individual with a disability."[1] Title I of the ADA prohibits employment discrimination against a "qualified individual with a disability" because of the disability. 42 U.S.C. § 12112(a). A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Only qualified individuals can maintain a claim under Title I.

The panel's decision is also supported by the legislative history and announced Congressional purpose of the ADA. Congress included the phrase "essential functions" in the definition of a qualified individual with a disability to "ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, *i.e.*, the non-marginal functions of the job. . . . " H.R. Rep. No. 485, part 2, 101st Cong., 2d Sess. 55 (1990). Significantly, Petitioner

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[1] As noted above, the Title I issue was not before the *en banc* court because no party sought rehearing on that issue.

cites no legislative history of the ADA that even hints that Congress intended Title I to protect any persons other than qualified individuals with disabilities as that term is defined in the statute. In fact, the legislative history of the ADA clearly and uniformly states that Congress intended Title I to prohibit discrimination against *qualified* individuals with disabilities.[2] *See* S. Rep. No. 116, 101st Cong., 1st Sess. 25-29 (1989); H.R. Rep. No. 485, part 2, 101st Cong., 2d Sess. 54-60; H.R. Rep. No. 485, part 3, 101st Cong., 2d Sess. 31-39 (1990); *see also Gonzales v. Garner Food Servs.*, 89 F.3d 1523, 1527 (11th Cir. 1996) (review of ADA and legislative history indicates that Congress intended to limit Title I protections to persons who could perform the essential functions of a job) , *cert. denied*, 117 S. Ct. 1822 (1997). Thus, as the Sixth Circuit panel court recognized, the legislative purpose of Title I

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[2] This purpose differentiates the ADA from other federal and state legislation that is designed to provide benefits to individuals who *cannot* work. For example, in order to be entitled to receive benefits under the Social Security Act, 42 U.S.C. § 310 *et seq.*, a claimant must certify not only that she suffers from a mental or physical impairment that renders her unable to perform her previous work, but also that the impairment prevents her from engaging in any other kind of substantial gainful work. *See* 42 U.S.C. § 423(D)(2)(A). Similarly, workers' compensation statutes are designed in large part to protect workers who are unable to perform any work, whether temporarily or permanently. *See, e.g., Smith v. Tennessee Furniture Industries, Inc.*, 369 S.W.2d 721 (Tenn. 1963). Unlike the Social Security Act and workers' compensation laws, Title I of the ADA exists solely to ensure that people with a disability who *can* work are given the opportunity to do so. Consequently, it violates neither the language nor the spirit of the ADA to hold that Petitioner is not entitled to its protection.

of the ADA was to ensure that the disabled could obtain and keep employment. App. at 49. While the ADA generally seeks to protect individuals with disabilities, Congress deliberately restricted that protection in the workplace context to the disabled who are able to work, with an accommodation, if necessary. *Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 212 (4th Cir. 1994).

Thus, the panel's ruling that Petitioner, who by her own admission is totally disabled from working at any job by severe depression, is not a "qualified individual with a disability," is consistent with the plain meaning of the statute and consonant with Congress's clear intent to confine the protection of Title I to employees who are able to perform the essential functions of their job.

Contrary to Petitioner's argument, the panel's reliance on *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768 (8th Cir. 1987), *cert. denied*, 485 U.S. 938 (1988), was not misplaced. In *Beauford*, the Eighth Circuit found that an employee who was totally disabled and could no longer perform the essential functions of her job was not entitled to maintain a claim for fringe benefits under Section 504 of the Rehabilitation Act of 1973. The Eighth Circuit recognized that the Rehabilitation Act reached discrimination in fringe benefits but determined that the plaintiff was not entitled to the protection of the Rehabilitation Act because the Act only extended its coverage to "otherwise qualified handicapped individuals." 831 F.2d at 770 (quoting 29 U.S.C. § 794) (emphasis omitted). Because the plaintiff in *Beauford* admitted that she was wholly unable to meet the defendant's job requirements "in spite of her handicap," the Court denied her claim for

fringe benefits. *Id.* at 771. In so holding, the Eighth Circuit stated that "though it may seem undesirable to discriminate against a handicapped employee who is no longer able to do his or her job, this sort of discrimination is simply not within the protection of section 504." *Id.*

The Sixth Circuit panel properly relied on the compelling reasoning of the *Beauford* court. Like the *Beauford* plaintiff, Petitioner is totally disabled and is not a "qualified individual with a disability." Petitioner's argument that "*Beauford* differs from this action because the Rehabilitation Act does not specifically address discrimination in contractual relationships" is unavailing. Pet. at 22. Contrary to Petitioner's assertion, both statutes are similar in their language and in their proscription of discrimination based on disability even with respect to fringe benefits.[3]

In any event, the Sixth Circuit panel did not rely solely on *Beauford* to determine that Petitioner lacked standing under Title I of the ADA. The court also found support in decisions of the Seventh and Eleventh Circuits, which have also concluded that totally disabled individuals who cannot perform the essential functions of their jobs do not have standing to challenge their employer-provided benefit plans under Title I of the ADA. *EEOC v.*

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[3] Both the ADA and the Rehabilitation Act require that in order to be entitled to their protection, an individual must otherwise be qualified to perform the essential functions of her job. *Compare* 29 U.S.C. § 794 (discrimination prohibited only against "otherwise qualified handicapped individuals") *with* 42 U.S.C. § 12112(a) and 29 C.F.R. § 1630.2(m) (discrimination prohibited only against a "qualified individual with a disability").

CNA Insurance Cos., 96 F.3d 1039, 1043-44 (7th Cir. 1997); *Gonzales v. Garner Food Servs.*, 89 F.3d 1523 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1822 (1997).

To circumvent the import of the statutory language and legislative history of Title I, Plaintiff has advanced one tortuous construction of the statute after another. For example, despite the fact that nothing in the statute confers standing to the totally disabled, Petitioner attempted to persuade the Sixth Circuit panel that it should overlook her inability to work and find that she was entitled to protection under Title I to preserve her "employment position" as a "benefit recipient." The panel court refused to create an entirely new category of employees entitled "benefit recipients" and found instead that Petitioner's construction of the statute conflicted with the plain meaning of its words. App. at 51. The Seventh and Eleventh Circuits have also rejected this construction. *CNA Ins. Cos.*, 96 F.3d at 1043 ("an employment position is a job"); *Garner Food Servs.*, 89 F.3d at 1530. This agreement among circuit courts that Title I applies only to those who can fulfill the essential functions of the job at issue is yet another reason for the Court to refrain expending its limited resources by reviewing Petitioner's Title I claim.

Changing tactics, Petitioner now urges this Court to apply the reasoning of its recent decision in *Robinson v. Shell Oil*, 117 S. Ct. 843 (1997), to manufacture standing for those who are not qualified individuals with disabilities under Title I. Petitioner resorts to the argument that "the Sixth Circuit should have examined the issue of Petitioner's right to bring suit under Title I in the context of the ADA's broader meaning and purpose of the statute as a whole." Pet. at 24. Petitioner supports this expansion

of the scope of Title I by citing the preamble to the statute while disregarding the specific provisions enacted by Congress to address discrimination against the disabled. Pet. at 24. According to Petitioner, the Court must review this case to "extend to the ADA the same principles of statutory construction to secure civil rights within the full intent of Congress which were applied in Robinson." Pet. at 23. Petitioner is wrong. Nothing in the ADA or recent circuit court decisions supports intervention by this Court to expand the scope of Title I beyond the rights that Congress plainly intended to secure, and the reasoning of the *Robinson* decision is similarly unpersuasive on this issue.

In *Robinson*, the Court determined that former employees could pursue claims against their employers for discrimination under the anti-retaliation provision of Title VII. 117 S. Ct. at 849. The Court found that the term "employees" as used in Title VII was ambiguous and that the "broader context" of Title VII implied that the anti-retaliation provisions of the statute should be extended to include former employees. *Id.* at 848.

The Court's decision in *Robinson* does not advance Petitioner's contention that a totally disabled individual has standing to maintain an action under Title I of the ADA. The decision below was not based on whether Petitioner was a current or former employee, and consideration of her employment status was not necessary to the determination that she was not entitled to the protections of Title I. Further, unlike Title VII, the application of the ADA's protection is not determined merely by reference to the word "employee." In the ADA the meaning of "employee" is not ambiguous because Congress imposed

specific requirements that must be met by those seeking protection under Title I of the statute. The ADA establishes that an employee's current[4] ability to perform the essential functions of the job as defined by the employer is a threshold requirement for invoking ADA protection. 42 U.S.C. § 12111(8). Title VII contains no such requirement. Thus, the Court's analysis in *Robinson* has no relevant application to the Title I issue in this action.

Petitioner implores this Court to apply the "broader context" of the statute at the expense of its unambiguous language and clear Congressional intent. Petitioner's shifting constructions of Title I are best disposed of by applying the elemental rule of statutory construction: "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous . . . that language must ordinarily be regarded as 'conclusive.' " *Reves v. Ernst & Young*, 507 U.S. 170, 113 S. Ct. 1163, 1169 (1993) (citations omitted); *see also Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373 (1986) (the "purpose" of a statute is determined first by

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[4] Petitioner's attempt to analogize the ADA to Title VII by claiming that the ADA contains no "temporal qualifier" in its definition of "employee" is simply wrong. The ADA specifically extends the protection of Title I to qualified individuals with a disability "who, with or without reasonable accommodation, *can* perform the essential function of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added); *see also* 29 C.F.R. § 1630.2(m). The actual ability to come to work and perform the essential functions of the job are paramount to the determination of whether an employee is "qualified" under the ADA. *Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 213 (4th Cir. 1994).

examining its plain language). Despite the broad pronouncement of the statute's preamble (42 U.S.C. § 12101), an examination of the statute's language and the legislative history demonstrates that Congress did not extend protection to all disabled employees. No doubt as a result of the inevitable compromise of legislators with disparate agendas and constituencies, the protection afforded by Title I of the ADA was expressly limited to individuals who are able to work, with or without a reasonable accommodation. In sum, when Congress enacted the ADA it simply did not provide the protection that Petitioner seeks.

It is Petitioner's construction of Title I that is demonstrably at odds with the language and Congressional intent expressed in the statute. The Sixth Circuit panel's thoughtful analysis of the issue was eminently correct and presents no basis for review by this Court. Petitioner is not a qualified individual with a disability and lacks standing to maintain her action under Title I. It is not incumbent upon this Court to rewrite the ADA.

B. Even If Petitioner Had Standing Under Title I of the ADA, the Terms of the Plan Do Not Violate the ADA by Providing Disparate Benefit Levels.

Petitioner argues that the terms of the Plan, which provide for long-term disability benefits until age 65 for physical disabilities but which limit such benefits for mental disabilities to two years, violate the ADA. Even if Petitioner had standing under Title I of the ADA, however, the Sixth Circuit's decision is plainly correct because

providing disparate levels of benefits to different classes of disabled individuals does not violate the ADA.

Congress enacted the ADA to prevent employers from completely denying coverage based on an individual's disability. The legislative purpose and history of the ADA confirm that the ADA ensures only that disabled employees are given the same access to the benefits offered by an employer as those offered to able-bodied employees. Thus, distinctions in the level of benefits provided for different conditions do not constitute discrimination if such distinctions are applied equally to all employees.[5] Congress addressed precisely this issue with regard to an employer who offers lesser benefits for mental as opposed to physical impairments:

> [W]hile it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, e.g., only a specified amount per year for mental health coverage, a person who has a mental health condition may not be denied coverage for other conditions such as for a broken leg or for heart surgery because of the existence of the mental health condition. . . . All people with disabilities must

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[5] The Equal Employment Opportunity Commission's own interpretive guidance of the ADA supports the Congressional intent to ensure that the disabled are provided equal access to benefits by their employers. *See EEOC Compliance Manual (BNA)* at 70:1052-53 (noting that distinctions between mental and physical conditions in the benefits provided by employers "constrain individuals both with and without disabilities" and "do not intentionally discriminate on the basis of disability.") .

> have equal access to the health insurance coverage that is provided by the employer to all employees.
>
> *S. Rep. No. 116, 101st Cong., 1st Sess., at 29; see also H.R. Rep. No. 485, part 3, 101st Cong., 2d Sess., at 71.*

The Supreme Court has held in Rehabilitation Act cases[6] that a disparity in the benefits offered for mental health conditions and physical conditions does not create a cognizable claim of discrimination against the disabled. *Traynor v. Turnage,* 485 U.S. 535 (1988); *Alexander v. Choate,* 469 U.S. 287 (1985). The Sixth Circuit in this case, and the Seventh Circuit and the Eighth Circuit have properly extended the same rationale used by this Court in *Traynor* and *Alexander* in their determination that employers do not violate the ADA by offering unequal benefits for mental and physical conditions. *See CNA Ins. Cos.,* 96 F.3d at 1044 (7th Cir. 1996); *Krauel v. Iowa Methodist Medical Center,* 95 F.3d 674 (8th Cir. 1996) (holding that employee benefit plan that did not provide coverage for treatment of infertility did not violate the ADA because the exclusion of such treatment applied to all employees).

In *Alexander v. Choate,* the Court held that the state of Tennessee did not violate section 504 of the Rehabilitation Act by reducing the number of in-patient days for which Medicaid would reimburse hospitals on behalf of a single recipient in a fiscal year. 469 U.S. at 309. The Court

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[6] Cases brought pursuant to the Rehabilitation Act are instructive as to the ADA. *See* 42 U.S.C. § 12117(b) (ADA and Rehabilitation Act to be construed so as not to achieve inconsistent or conflicting standards).

rejected the argument that such a reduction violated section 504 of the Rehabilitation Act by affecting the disabled more severely than those without disabilities and stated that the Rehabilitation Act "does not . . . guarantee the handicapped equal results from the provision of state Medicaid." *Id.* at 304. Instead, the Court noted, "section 504 seeks to assure even-handed treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance." *Id.* at 303. In *Traynor v. Turnage,* this Court subsequently held that a regulation permitting veterans to receive education assistance benefits beyond a ten-year period only if the mental or physical disability which prevented the veteran from completing his education was "not the result of [his] own willful misconduct" did not violate the Rehabilitation Act. The Court in *Traynor* specifically stated that the "central purpose of § 504 . . . is to assure that handicapped individuals receive 'even-handed treatment' in relation to non-handicapped individuals." *Id.* at 548 (citations omitted). The Court further stated that "[t]here is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." *Id.* at 549.

The legislative goal of the ADA mirrors that of the Rehabilitation Act. The ADA provides the disabled with equal access to benefits – not equal results. As a consequence, distinctions in insurance coverage that are equally applied to all employees do not intentionally discriminate on the basis of disability. The Sixth, Seventh and Eighth Circuits agree. These courts have uniformly ruled that the language and the legislative history of the

ADA do not evince an intent on the part of Congress to mandate parity in the benefits provided for mental and physical conditions.

Petitioner is not a victim of disability discrimination. As the Sixth Circuit *en banc* noted, "[b]ecause all employees at Schering-Plough, whether disabled or not, received the same access to the long-term disability plan, neither the defendants nor the plan discriminated between the disabled and the able bodied." App. at 23. Disabled employees were not charged more for the benefits that they received under the Plan and they could receive benefits under the same terms as employees who were not disabled.

Congress simply failed in enacting the ADA to mandate parity in the benefits provided to employees. Although Petitioner's situation may be one that evokes sympathy, Petitioner cannot properly ask this Court to rewrite the ADA. In *EEOC v. CNA* the Seventh Circuit succinctly observed:

> Without far stronger language in the ADA supporting this result, we are loath to read into it a rule that has been the subject of vigorous, sometimes contentious national debate for the last several years. Few, if any, mental health advocates have thought that the result they would like to see has been there all along in the ADA.

96 F.3d at 1044.

As the Sixth Circuit *en banc* noted, the recent passage of the Mental Health Parity Act, "suggests Congress believed that the ADA neither governs the content of insurance policies nor requires parity between physical

and mental illnesses. . . . " App. at 29. In passing the Mental Health Parity Act, which amends the Health Insurance Portability Act, Congress eliminated some of the distinctions between benefits offered for mental and physical conditions. For example, when a group health insurance plan does not have an annual or lifetime limit on the benefits offered for physical conditions, it may not contain such a limitation for mental health benefits.[7] 42 U.S.C. § 300gg-5(1)-(2). Logically, Congress would not have enacted the Mental Health Parity Act if the precise relief that Petitioner seeks, *i.e.*, required parity in the benefits for mental and physical illnesses in employer-provided insurance, had been provided under the ADA. Certiorari should not be granted to unravel an issue that remains the subject of Congressional consideration.

C. Petitioner's Assertion That Regulations Promulgated by the Equal Employment Opportunity Commission Interpreting Title I of the ADA Conflict With the Sixth Circuit Panel's Decision Does Not Provide a Proper Ground for Review by This Court.

Petitioner argues that the Sixth Circuit panel failed to accord the proper deference to regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") that interpret Title I of the ADA. The Sixth Circuit panel properly relied on the plain meaning of the statute rather than Petitioner's erroneous interpretation of the EEOC's regulations.

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[7] The Mental Health Parity Act does not have any effect on long term disability plans such as the one Petitioner challenges.

According to Petitioner's expansive interpretation, the EEOC's regulations provide that "an individual's present ability to perform the essential functions of his or her job is irrelevant" to the determination of whether the individual has standing to pursue an action under Title I of the ADA. Pet. at 27. A review of the actual language of the provisions cited by Petitioner reveals that Petitioner's interpretation is a mere chimera that is entitled no deference by this Court. For example, 29 C.F.R. § 1630.4(f) merely provides that covered entities may not discriminate against a *qualified individual with a disability* with regard to the "fringe benefits available by virtue of employment, whether or not administered by the covered entity," while 29 C.F.R. § 1630.13(b)[8] prohibits employers from requiring medical examinations of employees or making inquiries with regard to the nature or severity of a disability. The cited regulations clearly do not support the expansion of those who may bring actions under Title I to persons who are unable to work.

Thus, the alleged conflict between the Sixth Circuit's decision and the EEOC's regulations does not warrant review. The regulations cited by Petitioner are not truly in conflict with the Sixth Circuit's interpretation of Title I or with the express language of the statute. Even if the cited EEOC regulations had actually supported Petitioner's

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[8] 29 C.F.R. § 1630.13(b) states:

> Examination or inquiry of employees. Except as permitted by § 1630.14, it is unlawful for a covered entity to require a medical examination of an employee or to make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability.

argument that her complete inability to work is irrelevant under Title I, the Sixth Circuit would not owe any deference to an erroneous interpretation of a Congressional statute. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989) (holding that "no deference is due to agency interpretations at odds with the plain language of the statute itself").

II. PETITIONER EXAGGERATES THE SIGNIFICANCE OF ANY CONFLICT BETWEEN THE FIRST AND SIXTH CIRCUITS ON THE TITLE III ISSUE.

Petitioner relies heavily on a purported conflict between the Sixth Circuit and a decision of the First Circuit. Pet. at 9-15. Petitioner overstates the significance of the conflict. Moreover, the analysis of the First Circuit is flawed and should be disregarded.

In *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Assoc.*, 37 F.3d 12 (1st Cir. 1994), the First Circuit determined that the meaning of the term place of "public accommodation" in Title III is not limited to physical structures. 37 F.3d at 19. Citing technological advances in the means of conducting commercial activity, the First Circuit found that Title III applies even when a disabled person merely makes a request over the telephone. *Id.* The First Circuit did not even reach the precise issue addressed by the Sixth Circuit *en banc*, namely whether Title III applies to regulate the content of the products or services offered by places of public accommodation. 37 F.3d at 20. Thus, the First Circuit's decision, which solely addresses the issue of the disabled's access

to the goods and services of places of public accommodation is inapposite.

What is really at issue here is whether Title III permits the regulation of the content of the goods and services offered by places of public accommodation. As noted above, the legislative history of the ADA clearly explains that Congress merely intended to provide equal access to the goods and services offered by places of public accommodation. Petitioner has not presented the Court with a manifest conflict between circuit courts.[9] As a consequence, it would be premature for the Court to expend its resources to settle a variance that may be resolved by further developments among the circuit courts and lower courts.

In any event, the First Circuit's interpretation of the meaning of Title III is flawed and inconsistent with the plain meaning of the statute. The Sixth Circuit correctly concluded that Petitioner did not have a claim under Title III because the prohibitions of Title III only apply to "places of public accommodation." App. at 17-20. The

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[9] Petitioner cites several district court cases which she contends have addressed Title III's "applicability to discrimination in the provision and coverage of insurance. . . ." Pet. at 14. The existence of these cases, whatever the true import of their holdings, is not determinative of the propriety of granting the Petition. The Court expends its resources when there is a conflict among the circuit courts calling for review. Supreme Court Rule 10(a). Supreme Court review is not warranted to correct district court decisions. Instead, the Court should exercise its discretion and refrain from reviewing this issue until it is presented with a real conflict among circuit courts.

statute provides a list of physical locations as examples of places of public accommodation, without any reference to the content of the services offered by such places. 42 U.S.C. § 12181(7). This interpretation is confirmed by the legislative history of Title III which clarifies that Congress's express purpose in enacting Title III was to provide disabled persons with the same access to the goods and services offered by places of public accommodation as persons who are not disabled enjoy. *See, e.g.*, H.R. Rep. No. 485, 101st Cong., 2d Sess., at 35; S. Rep. No. 116, 101st Cong., 1st Sess., at 58.

The Sixth Circuit also relied on its previous decision in *Stoutenborough v. National Football League*, 59 F.3d 580 (6th Cir.), *cert. denied*, 116 S. Ct. 674 (1995), which found that Title III plainly applied only to physical places and that television broadcasts of blacked out football games do not involve a "place of public accommodation." 59 F.3d at 583. Thus, relying on the plain meaning of the statute, its legislative history and Sixth Circuit precedent, the Court reasoned that the plain meaning of the text of Title III refers solely to physical places.

III. PETITIONER'S CLAIM THAT THE JUSTICE DEPARTMENT'S INTERPRETATION OF TITLE III CONFLICTS WITH THE SIXTH CIRCUIT'S *EN BANC* DECISION DOES NOT WARRANT REVIEW BY THIS COURT.

Petitioner argues that selected language from the Department of Justice Technical Assistance Manual suggests that Title III permits the regulation of the substantive terms of insurance contracts. *See Department of Justice*

Technical Assistance Manual, § III-3.11000 *reprinted in Americans with Disabilities Act Manual (BNA)* at 90:0917. According to Petitioner, the Sixth Circuit did not give this interpretation of Title III the deference due to agency interpretations[10] under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

The fundamental principle in the construction of statutes is that a court must give effect to the plain meaning of the statute's words. When the statute's meaning is plain and Congress has expressed its intent in unambiguous terms, a reviewing court need not defer to an agency's contrary interpretation of the statute. *Dole v. United Steel Workers*, 494 U.S. 26, 42-43 (1990); *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986). The principle of *Chevron* deference does not permit an agency to nullify through interpretation the clearly expressed intent of Congress.

Applying these principles, the Sixth Circuit correctly determined that the Department of Justice's interpretation of Title III to include the regulation of the content of insurance products did not merit deference. That interpretation is inconsistent with the express language of the

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[10] Other language in the same *Department of Justice Technical Manual* supplies an interpretation of Title III that is inconsistent with the language cited by Petitioner. The Department of Justice also opines in conformity with its own regulations that "[a]s a general rule, a public accommodation is not required to alter its inventory to carry accessible or special products that are designed for or are easier to use by customers with disabilities." *Department of Justice Technical Assistance Manual* § III 4.2500 *reprinted in Americans with Disabilities Act Manual (BNA)* at 90:0921. *See, e.g.*, 28 C.F.R. Part 36 (App. B) at 630.

ADA and ignores the guidance provided by Congress in the legislative history of the statute. App. at 13-14. The language of Title III clearly expresses Congress's intent to proscribe discrimination against the disabled "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations *of any place of public accommodation*. . . . " 42 U.S.C. § 12182(a) (1994) (emphasis supplied). Title III's framework is such that it is mainly descriptive of equality in the access to the physical facilities that it defines as "places of public accommodation." 42 U.S.C. § 12182. The actual words in the provision do not refer in any way to the content of the goods and services offered by the places of public accommodation.

Logically, if Congress had such an intent it could easily have used the precise words that would support the regulation of the content of the affected goods and services. Moreover, it is unlikely that Congress would have enacted a measure that would impose tremendous costs on business without any debate. Yet, a review of the legislative history shows that no such debate occurred. The fact that the potential for using Title III of the ADA to regulate the content of the goods and services offered by places of public accommodation was not even debated by Congress indicates that Congress was fully aware that Title III would have no such effect.

The Sixth Circuit owed no deference to the Department of Justice's impermissible construction of Title III since Congress clearly intended to limit the reach of Title III to providing the disabled with the opportunity for full

participation in, and access to, places of public accommodation. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508-09 (1992).

IV. THE SIXTH CIRCUIT'S HOLDING THAT TITLE III DOES NOT APPLY TO EMPLOYERS IS CORRECT.

The Sixth Circuit properly ruled that the Schering-Plough Respondents cannot be held liable under Title III of the ADA because "discrimination in the provision of fringe benefits during employment is governed strictly by Title I. . . . " App. at 22. As the Sixth Circuit ruled, Title III expressly does not govern the terms and conditions of employment by providers of places of public accommodation. *Id.* This ruling is supported by the legislative history of Title III which specifically and unambiguously states that "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by Title I of this legislation." Rep. No. 116, 101st Cong., 1st Sess. 58 (1989).

It is no accident that Congress entitled Title III "Public Accommodation and Services Operated by Private Entities." Title III explicitly pertains to the conduct of places of public accommodation in providing services. The plain language of Title III does not comprehend employment practices, and there is no textual basis for asserting a cause of action under Title III arising from the employment relationship.

On the other hand, Title I defines a comprehensive scheme for addressing discrimination against the disabled in the terms, conditions and privileges of employment. This scheme applies exclusively to employment and it encompasses the very claims that Petitioner asserted below. Many of Title I's provisions would be rendered superfluous if this Court were to decide that claims against employers who provide disability benefits through third parties are cognizable under Title III. Moreover, any employer who purchased a disability plan and offered its employees the opportunity to participate in it could be subject to suit under both Title I and Title III. It follows that such an employer who was not liable under Title I because the employee was not a "qualified individual with a disability," would still be subject to liability under Title III, which does not apply the same standing requirement.

There is an additional incongruity. Title I of the ADA incorporates the procedures of Title VII of the Civil Rights Act of 1964, including its exhaustion requirements. 42 U.S.C. § 12117(a). If actions based on the employment relationship were also cognizable under Title III, a disabled employee could circumvent the exhaustion requirements of Title I by bringing his disability claim under Title III. In many cases, the exhaustion requirements of Title I would be rendered irrelevant.

Petitioner does not directly address this ruling, no doubt because no authority exists to refute the above unequivocal statement of legislative intent. Her claims against the Schering-Plough Respondents arise from the employment relationship, which Congress has exclusively covered by Title I of the ADA. As a consequence,

this Court should not review the ruling that the Schering-Plough Respondents cannot be held liable to Petitioner under Title III of the ADA.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FREDERICK J. LEWIS
Counsel of Record
NICOLE MARIE WALTHOUR
McKNIGHT HUDSON LEWIS/
FORD & HARRISON, LLP
6750 Poplar Avenue
Memphis, Tennessee 38138
Telephone: 901-756-1550

Attorneys for Respondents Schering-Plough Corporation and Schering-Plough Animal Health Care Products, Inc.